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TRANSCRIPT OF RECORD,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 350.

JOHN BAD ELK, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

FILED JULY 14, 1899.

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INDEX.

	Original.	Print.
Citation and service	1	1
Writ of error	2	1
Return on writ of error	2½	2
Caption	3	2
Presentment of indictment	3	2
Indictment	4	3
Order remitting cause to circuit court	6	4
Certificate of clerk of district court	7	4
Arraignment and plea	8	5
Order beginning trial	10	5
Order continuing trial	11	6
Order continuing trial	12	6
Order concluding trial	13	7
Verdict	14	7
Order taking motion in arrest under advisement	14	7
Order overruling motion in arrest of judgment	15	8
Judgment and sentence	15	8
Order allowing time to prepare bill of exceptions	16	8
Bill of exceptions	17	9
Evidence for plaintiff	17	9
Testimony of B. J. Gleason	17	9
High Eagle	20	11
Lone Bear	21	11
Pine Bird	23	12
Shouts At	24	13

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	Original.	Print.
Bill of exceptions—Continued.		
Evidence for plaintiff—Continued.		
Testimony of Alfred Old Shield	24	13
Under the Baggage	25	14
Steel Horses	25	14
Dog Chief	25	14
Dr. Jas. R. Walker	25	14
Evidence for defendant	26	14
Testimony of John Bad Elk	26	14
Harrison White Thunder	28	15
Defendant's requests to charge	29	16
Charge of the court	31	17
Exceptions to charge	37	20
Judge's certificate to bill of exceptions	37	20
Order allowing writ of error	38	21
Assignment of errors	40	21
Petition for writ of error	43	23
Order allowing writ of error	46	24
Clerk's certificate	47	25

1 *Citation.*

UNITED STATES OF AMERICA, ss:

To the United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the district of South Dakota, wherein John Bad Elk is plaintiff in error and the United States is defendant in error, to show cause on the second Monday of October next in said Supreme Court, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

JOHN E. CARLAND, *District Judge.*

Dated May 19th, 1899.

Due service of the foregoing citation and of a copy thereof admitted this 19th day of May, A. D. 1899.

JAMES D. ELLIOTT,
United States Attorney.

W. G. PORTER,
Asst. U. S. Att'y.

(Indorsed:) Citation. Filed May 19, 1899. Oliver S. Pendar, clerk.

2 *Writ of error.*

UNITED STATES OF AMERICA, ss.:

The President of the United States, to the honorable judges of the circuit court of the United States for the district of South Dakota, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the circuit court, before you, or some of you, between the United States, plaintiff, and John Bad Elk, defendant, a manifest error hath happened to the great damage and injury of the said John Bad Elk, defendant, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States at Washington, within sixty days from the date hereof, together with this writ, so that you have the same at Washington on the second Monday of October next, in said Supreme Court, to be then and there held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to laws and customs of the United States should be done.

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Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 19th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.] OLIVER PENDAR,
Clerk of the Circuit Court of the United States for the District of South Dakota.

Allowed by

JOHN E. CARLAND, *Judge.*

2½ UNITED STATES OF AMERICA,
Eighth Judicial Circuit, District of South Dakota, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Supreme Court a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of the circuit court of the United States within and for the district of South Dakota, at office in the city of Sioux Falls, this 28th day of June, A. D. 1899.

[SEAL.] OLIVER PENDAR, *Clerk.*

(Indorsed:) Writ of error. Filed May 19, 1899. Oliver S. Pendar, clerk.

3 In the circuit court of the United States within and for the district of South Dakota.

THE UNITED STATES, PLAINTIFF, *vs.* JOHN BAD ELK, DEFENDANT. } Southern division. Docket No. 336.

Be it remembered that on the 5th day of April, A. D. 1899, an indictment against said defendant, John Bad Elk, for the crime of murder, was remitted into this court by the district court of the United States for this district, and said indictment, together with a transcript of the record of said district court, was filed in the office of the clerk of this court, which said indictment and record of said district court is the following, to wit:

In the district court of the United States within and for the district of South Dakota.

UNITED STATES, PLAINTIFF, *vs.* JOHN BAD ELK, DEFENDANT. } Southern division. Docket No. 697.

Be it remembered that on the 5th day of April, A. D. 1899, the following proceedings were had and made of record on folio 438, Journal "D," of said court in the above-entitled case, to wit:

Now come the grand jury, twenty-three being present, and by their foreman, and in their presence, do present to the court:

(No. 697.) An indictment against John Bad Elk, charging him with the crime of murder.

Which said indictment is duly filed by the clerk, and the grand jury, having further business before them, retire.

4 Which said indictment is the following, to wit:

District court of the United States of America for the southern division of the district of South Dakota, in the eighth judicial circuit.

At a stated term of the district court of the United States of America for the southern division of the district of South Dakota, begun and held at the city of Sioux Falls, within and for the district and circuit aforesaid, on the first Tuesday of April, in the year of our Lord one thousand eight hundred and ninety-nine.

The grand jurors of the United States of America, good and lawful men, summoned from the body of the southern division of the district aforesaid, then and there being duly empanneled, sworn, and charged by the court aforesaid to diligently inquire and true presentment make, for said district of South Dakota in the name and by the authority of the United States of America, upon their oaths do present:

That John Bad Elk, an Indian of the Sioux tribe of Indians, late of the Pine Ridge Indian Reservation, in said district, heretofore, to wit, on the thirteenth day of March, in the year of our Lord one thousand eight hundred and ninety-nine, with force and arms, at the Pine Ridge Indian Reservation, in the district aforesaid, and within the exclusive jurisdiction of this court, in and upon one John Kills Back, unlawfully, wilfully, feloniously, and of his malice aforethought did make an assault, and the said John Bad Elk, one certain revolver, commonly called a six-shooter, then and there loaded and charged with gunpowder and leaden

5 bullets, which said revolver he, the said John Bad Elk, then and there held in his hand, then and there wilfully, unlawfully, feloniously, and of his malice aforethought, did discharge and shoot off, at, to, against, and upon the said John Kills Back, and that the said John Bad Elk, with a leaden bullet aforesaid, out of the revolver aforesaid, then and there by force of the gunpowder aforesaid, by the said John Bad Elk, discharged and shot off as aforesaid, the said John Kills Back, in and upon the body of him, the said John Kills Back, a little to the left of the centre of the body in front and about two inches below the edge of the tenth rib of him, the said John Kills Back, then and there unlawfully, wilfully, feloniously, and of his malice aforethought, did strike, penetrate, and wound; giving to him, the said John Kills Back, then and there, with a leaden bullet aforesaid, so as aforesaid shot, discharged, and sent forth out of the revolver aforesaid, by the said John Bad Elk, in and upon the body of him, the said John Kills Back, a little to the left of the center of the body in front and and about two inches below the edge of the tenth rib of him, the said John Kills Back, one mortal wound, of which said mortal wound, he, the said John Kills Back, then and there on the same day, to wit, on the thirteenth day of March, in the year of our Lord one thousand eight hundred and ninety-nine, died. And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said John Bad Elk, him, the said John Kills Back, in the manner and form, and by the means aforesaid, then and there wilfully, unlawfully, feloniously, and of his malice aforethought, did kill and murder, contrary

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to form, force, and effect of the statute of the United States
6 in such case made and provided, and against the peace and dignity of the United States of America.

JAMES D. ELLIOTT,
United States Attorney.

Names of witnesses sworn and examined before the grand jury: High Eagle, Lone Bear, B. J. Gleason, J. R. Walker, R. O. Pugh, Alfred Old Shield, Shouts At, Pine Bird, Chief Dog, Brings Plenty, Steals Horses.

(Endorsed:) Remitted into the U. S. circuit court by order of the U. S. district court and filed this 5th day of April, 1899. Oliver S. Pendar, clerk U. S. circuit court, district of South Dakota.

No. 697. The United States vs. John Bad Elk. Indictment for murder. A true bill. C. S. Blodgett, foreman. Presented in open court by the foreman of the grand jury in the presence of the grand jury and filed as a record of this court this 5th day of April, A. D., 1899. Oliver S. Pendar, clerk. James D. Elliott, U. S. attorney, district of South Dakota.

And afterwards, to wit, on the same day, i. e., April 5th, 1899, the following proceedings were had and made of record in said court, on folio 438, Journal "D" thereof, in words and figures the following, to wit:

THE UNITED STATES, PLAINTIFF,
vs.
JOHN BAD ELK, DEFENDANT. } Ind. No. 697, S. D.

7 Whereas, an indictment was presented to said district court of the United States of America within and for the district of South Dakota by the grand jury of said United States district court, at Sioux Falls, South Dakota, on this 5th day of April, A. D. 1899, against John Bad Elk, charging him with the crime of murder:

Now, therefore, in accordance with section 1039 of the Revised Statutes of the United States, it is hereby ordered that the said indictment, together with all the files in said case, be remitted forthwith to the circuit court of the United States for the district of South Dakota, at the April term, A. D. 1899, of said court; and the clerk of this court is hereby directed to enter this order in the minutes of the court, as provided by law, and to transmit a transcript of this order, and all proceedings heretofore had in this court in said case, together with the indictment and files in this case, to the clerk of the circuit court of the United States of the district of South Dakota, to be by him filed and entered of record in his office according to law.

UNITED STATES OF AMERICA, *set:*

I, Oliver S. Pendar, clerk of the district court of the United States within and for the district of South Dakota, do hereby certify that the foregoing is a true and correct copy of the entry of the presentment of the indictment, and the order of court remitting the same to the circuit court of the United States for the district of South Dakota, and that the

indictment in said case, to wit, the United States vs. John Bad Elk, annexed hereto is the original indictment referred to and filed in said district court, and I do hereby remit said original indictment, together
8 with the transcript of the record in said district court, in said case, to the circuit court of the United States within and for the district of South Dakota, pursuant to the order of said district court.

In witness whereof I hereunto subscribe my name as clerk of the district court of the United States within and for the district of South Dakota, and affix the seal of said court, at Sioux Falls, in said district, this 5th day of April, A. D. 1899.

[OFFICIAL SEAL.] OLIVER S. PENDAR, *Clerk.*

(Endorsed.) No. 326. U. S. circuit court, district of South Dakota. The United States vs. John Bad Elk. Original indictment, together with district court record. Filed April 5, 1899. Oliver S. Pendar, clerk.

And afterwards, to wit, on the 5th day of April, A. D., 1899, the following proceedings were had and made of record of said court, on folio , journal in words and figures the following, to wit:

THE UNITED STATES, PLAINTIFF, *vs.* JOHN BAD ELK, DEFENDANT. } Southern Division, Docket No. 336.

Arraignment and plea.

Now comes said defendant, in the custody of the U. S. marshal, and comes his attorney, S. B. Van Buskirk, esq., and now the assistant U. S. attorney, moves his arraignment; thereupon Charles
9 Merrivale is duly sworn as interpreter, and now the indictment is read in open court, by W. G. Porter, esq., assistant U. S. district attorney, and the same is interpreted to the defendant, who answers that he has been indicted by his true name, and said defendant, John Bad Elk, then and there enters his oral plea, through his interpreter, of not guilty to said indictment.

And afterwards, to wit, on the 13th day of April, A. D. 1899, said case came on for trial before the court and a jury, and was duly tried commencing on said date, and following days, as appears by the record of said court, entered in the journal thereof on April 13, 14, 15, 17, in words and figures the following, to wit:

10 THURSDAY, *April 13th, A. D. 1899.*

THE UNITED STATES, PLAINTIFF, *vs.* JOHN BAD ELK, DEFENDANT. } # 336.

On this day come the United States of America, plaintiff, by James D. Elliot, esq., attorney for the district of South Dakota, and Wm. G. Porter, esq., his assistant, and comes the said defendant, John Bad Elk, in custody of the marshal, and by his attorney, S. B. Van Buskirk, esq., and it appearing from the returns of the marshal that the said defendant

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has been served with a duly certified copy of the indictment in this cause and a full and complete list of the witnesses in this cause, and that he has also been served with a full and complete list of the petit jury, as selected and drawn, pursuant to the statutes of the United States, for the present term of this court, more than two entire days heretofore; now, on motion of the plaintiff, by its said attorney, it is ordered that a jury come to try the issue joined:

Whereupon the following were selected for trial of this cause, to wit: Willis Mayne, J. O. Terrill, Ed. Baldwin, Charles Searls, Joseph Kotsba, A. B. Green, C. H. Capps, J. M. Blunt, Ira Howard, Samuel Dickey, J. R. Petrie, L. B. Goodell; twelve good and lawful men of the southern division of the district aforesaid, duly selected, empanneled, and sworn to try the issues joined, and a true verdict render, according to the law and the evidence.

Time for adjournment having arrived, further proceedings on the trial of this cause are continued until the opening of the court to-morrow morning.

11 FRIDAY, *April 14th, A. D. 1899.*

THE UNITED STATES, PLAINTIFF, }
vs. } = 336.
JOHN BAD ELK, DEFENDANT. }

This day again come the parties to this cause, by their respective attorneys, also the jury heretofore empanneled and sworn; the defendant is present in the custody of the marshal, and the trial proceeds as follows:

W. G. Porter, esq., opens the case on behalf of the plaintiff.

Chas. Merrivale is selected and duly sworn as interpreter for the purposes of this trial.

High Eagle is sworn and examined on behalf of the plaintiff.

B. J. Gleason is sworn and examined on behalf of the plaintiff.

Lone Bear is sworn and examined on behalf of the plaintiff.

Pine Bird is sworn and examined on behalf of the plaintiff.

Shouts At is sworn and examined on behalf of the plaintiff.

Alfred Old Shield is sworn and examined on behalf of the plaintiff.

Under The Baggage is sworn and examined on behalf of the plaintiff.

Brings Plenty is sworn and examined on behalf of the plaintiff.

Steals Horses is sworn and examined on behalf of the plaintiff.

Shouts At is recalled and further examined on behalf of the plaintiff.

Chief Dog is sworn and examined on behalf of the plaintiff.

12 Time for adjournment having arrived, and the trial of this cause not being completed, it is ordered that further proceedings herein be continued until to-morrow morning at the opening of court.

SATURDAY, *April 15th, A. D. 1899.*

THE UNITED STATES, PLAINTIFF, }
vs. } = 336.
JOHN BAD ELK, DEFENDANT. }

This day again come the parties to this cause, by their respective attorneys, also the jury heretofore empanneled and sworn; the defendant

is present in the custody of the U. S. marshal, and the trial proceeds as follows:

Geo. H. Purvis is sworn and examined on behalf of the plaintiff.

Dr. James R. Walker is sworn and examined on behalf of the plaintiff.

Here plaintiff rests.

Now, by permission of the court, witness Under The Baggage is recalled and cross-examined on behalf of the defendant.

S. B. Van Buskirk, esq., opens the case on behalf of the defendant.

John Bad Elk, the defendant, is sworn and examined on his own behalf.

Harrison White Thunder is sworn and examined on behalf of the defendant.

13 Here the defendant rests.

High Eagle is recalled and examined on behalf of the plaintiff in rebuttal.

Shouts At is recalled and examined on behalf of the plaintiff in rebuttal.

Here both sides rest.

S. B. Van Buskirk, esq., sums up the case to the jury on behalf of the defendant.

Jas. D. Elliott, esq., sums up the case to the jury on behalf of the plaintiff.

Now, the time for adjournment having arrived, further proceedings are continued until Monday, April 17th, A. D. 1899, at ten o'clock in the forenoon.

MONDAY, *April 17th, A. D. 1899.*

THE UNITED STATES, PLAINTIFF, }
vs. } = 336.
JOHN BAD ELK, DEFENDANT. }

This day again come the parties to this cause, by their respective attorneys, also the jury heretofore empanneled and sworn; the defendant is present in the custody of the marshal, and the trial proceeds as follows:

And the said jury, after hearing the evidence and argument of counsel and receiving the charge of the court, retired at 10:30 o'clock in the forenoon, to consider of their verdict, in custody of bailiffs for the purpose especially sworn.

Now, at 12.00 o'clock m., comes the said jury into court, the defendant is present in the custody of the marshal, with his attorney, and

14 the said jury return their verdict in writing, as follows, to wit:

We, the jury, find the defendant guilty as charged in the indictment.

Dated April 17, 1899. I. R. HOWARD, *Foreman.*

Which said verdict is then and there entered of record and the jury discharged from further consideration of the case; and it is ordered that said defendant, John Bad Elk, be committed to the custody of the United States marshal pending further proceedings in this case.

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And afterwards, to wit, on the 18th day of April, A. D. 1899, the following proceedings were had and made of record in said court, as follows, to wit:

TUESDAY, *April 18th, A. D. 1899.*

THE UNITED STATES, PLAINTIFF,
vs.
JOHN BAD ELK, DEFENDANT. } # 336.

This matter comes on for hearing this day, upon defendant's motion in arrest of judgment, filed this day; the defendant is present in the custody of the marshal, and with him his attorney, S. B. Van Buskirk, esq., and now the said motion is argued to the court by counsel, S. B. Van Buskirk, esq., arguing on behalf thereof and J. D. Elliott, esq., in opposition thereto; whereupon the court reserves its ruling and takes the matter under advisement.

Now, on motion of the district attorney, it is ordered that
15 the time be fixed for pronouncing sentence at the opening of court to-morrow morning.

And afterwards, to wit on the 19th day of April, A. D. 1899, an order was made overruling the motion in arrest of judgment; whereupon the judgment and the sentence of the court was pronounced in said case by the court, and thereafter an order was made granting time to prepare and settle the defendant's bill of exceptions herein; which said orders and sentence of the court was duly entered of record in the journal of said court in words the following, to wit:

WEDNESDAY, *April 19th, A. D. 1899.*

THE UNITED STATES, PLAINTIFF,
vs.
JOHN BAD ELK, DEFENDANT. } # 336.

The defendant's motion in arrest of judgment having been heretofore argued by counsel and submitted to the court now at this time, said defendant being present in the custody of the marshal, with his attorney, S. B. Van Buskirk, esq., it is ordered by the court that said motion in arrest of judgment be, and the same is hereby, overruled.

To the entry of which order the defendant, by his counsel, then and there excepts; which exception is duly allowed by the court.

THE UNITED STATES, PLAINTIFF,
vs.
JOHN BAD ELK, DEFENDANT. } No. 336. Southern division. Convicted of murder.

Now, on this 19th day of April, A. D. 1899, the United States district attorney and the above-named defendant, John Bad Elk, with his counsel, came into court, and this being the day fixed by the court for pronouncing judgment upon the conviction of the crime of murder,
16 as charged in the indictment, the said defendant is now asked by the court if he has any legal cause to show why the judgment of the law upon said conviction should not be pronounced against him. And

the said defendant now answers that he has no cause to show, and the said defendant having been duly convicted of the crime of murder, in said United States circuit court for the district of South Dakota—

It is now by the court here considered, ordered, and adjudged, and the sentence of the court is that you, John Bad Elk, be remanded to the common jail of the county of Minnehaha, within the State of South Dakota, and there safely kept until the 16th day of June, A. D. 1899.

And that on said day you be taken by the marshal of the United States for the district of South Dakota to some private and convenient place within the county of Minnehaha, of the State of South Dakota, and then and there, between the hours of eight o'clock a. m. and four o'clock p. m. of said day, be, by the said marshal, hung by the neck until you are dead.

THE UNITED STATES, PLAINTIFF, *vs.* JOHN BAD ELK, DEFENDANT. } = 336.

On motion of the defendant, by his attorney, S. B. Van Buskirk, esq., it is ordered that forty days be granted from this date within which defendant may prepare, serve, and settle his bill of exceptions herein.

And, to wit, on the same day the bill of exceptions is duly allowed by the judge and filed in the clerk's office, which said bill of exceptions is in words and figures the following, to wit:

17 United States of America, in circuit court, district of South Dakota, southern division.

UNITED STATES OF AMERICA *vs.* JOHN BAD ELK. } Bill of exceptions. Indictment for murder.

Be it remembered that at the April term of said court, A. D. 1899, to wit, on the 14th day of April in the year aforesaid, being at a regular term of said court begun and holden at the city of Sioux Falls, in said district, before his honor, John E. Carland, judge of the district court for said district, sitting and holding said court, the said cause come on for trial upon the indictment returned and filed therein and the plea of not guilty on the part of said defendant; and a jury duly empanneled and sworn to try said issue, and the plaintiff appearing by its attorney, James D. Elliott, United States attorney for said district, and the defendant in his own proper person and by his attorney, S. B. Van Buskirk, the following proceedings were had:

Captain B. J. GLEASON, being called by the plaintiff and being duly sworn, testified as follows:

For about two years prior to the 13th day of March last I have been additional farmer on the Pine Ridge Reservation, in South Dakota.

The defendant was a policeman in my district, and resided with his wife in a cottage near to the subagency buildings where I resided and had charge. I was instructed by the agent in charge of the Pine Ridge

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Indian Agency to order the Indian policeman under my charge to arrest any Indian charged with any violation of the rules and regulations prescribed by the Commissioner of Indian Affairs and cause them to be taken to the agency.

18 On the 8th day of March last I heard a couple of shots at or near where the defendant resided. I came down to my house; went in, and passed out of the side door of my house. As I stepped out of the door the defendant was passing. I asked him if he shot. He said that he did. I asked him what he shot for. He said that he shot into the air for fun. I said to him, "Come around to the office in a little while and we will talk the matter over." I had always found defendant to be truthful, and gave the matter but little thought at the time; but a complaint was made to me with relation to the defendant. He did not come to the office for several days.

Question. Did you give directions to Lone Bear and Crow, two policemen, on the 13th day of March last to arrest the defendant?

(To which question defendant, by his counsel, objected for the reason that the question is immaterial and incompetent, and that the testimony does not show that the witness had any power or authority to direct the arrest of the defendant, nor that he had violated any law of the United States or any rule or regulation of the Indian Department. Neither does it appear any process has been issued directing the arrest of the defendant.

Which objection was then and there overruled by the court; to which ruling of the court the defendant then and there duly excepted, which exception was then and there allowed by the court.)

Answer. I ordered Lone Bear and Crow, two policemen, to go and arrest the defendant. I gave a letter to Lone Bear, directed to Major Clapp, the agent at Pine Ridge, and told him to take the defendant to the agency at Pine Ridge.

The defendant was at this time stopping at his mother's, a

19 short distance from the subagency of which I had charge.

Crow not being there, Lone Bear and High Eagle went to make the arrest. This was in the afternoon of the 13th day of March last.

They went to defendant's mother's, where he was stopping; came back and reported that he was not there. I ordered them to return and wait for him and arrest him. They returned to make the arrest, but came back and reported that the defendant had gone to his brother's to get a horse, and said that he would go with them to the agency in the morning; that it was too late to go that night. I then told them to watch him and see that he did not go away, and in the morning to take him to the agency at Pine Ridge.

It is about twenty-five miles from where the defendant was stopping to Pine Ridge Agency.

I directed Lone Bear and Crow to report to me on Monday morning, March 13. Crow failed to report. I directed Lone Bear to have High Eagle assist him in the arrest, and I notified John Kills Back, the deceased, to relieve Bad Elk as school policeman and to assist Lone Bear and High Eagle to arrest defendant.

It was getting dark about the time that Lone Bear, High Eagle, and

John Kills Back, the deceased, started for the defendant's mother's place, where he was stopping the last time just before the killing of the deceased.

Soon afterwards I heard some shots fired and heard a man groan. A report soon came that John Kills Back had been shot and killed. I sent some parties to bring in his body. These parties returned in a short time with his body. He was dead when they arrived with the body at the schoolhouse near my office. He was killed on the Pine Ridge Reservation in South Dakota.

20 Cross-examination:

The directions that I gave for the arrest of the defendant and for watching him and seeing that he did not get away was not in writing; was given orally.

HIGH EAGLE, being called by the plaintiff, and being duly sworn, testified as follows:

I am a policeman at Pine Ridge Reservation. When Lone Bear and I were ordered to go and arrest John Bad Elk, the defendant, Lone Bear went along a little ahead of me to where defendant was stopping. When we got there defendant was not at his mother's. We then went back and reported to Captain Gleason. He sent us back to find and get the defendant. We then returned, and as we were going back saw the defendant coming towards his mother's place. When we arrived there Lone Bear remained outside and I went into the house. The defendant had just returned from looking after the schools, which was a part of his duties as a policeman. When I went into the house he was smoking. I told him that we had come to take him to the agency at Pine Ridge. He refused to go and I went outside. Then Lone Bear went into the house. Lone Bear and the defendant came out, and the defendant saddled his horse and went over to Harrison White Thunder's.

We followed along some distance after him and John Kills Back and I stopped at a house and Lone Bear rode along to Harrison White Thunder's, where the defendant had gone. After stopping there for a while the defendant rode back to his mother's, and Lone Bear, John Kills Back, and I rode along a distance behind him, not very close. Defendant stopped on the road home and got a Winchester rifle and took home with him.

We rode back to the place where Captain Gleason was and told him that the defendant had been to his brother's to get a horse and that he said that he would go to Pine Ridge Agency with us in the morning. He told us to put out our horses, get our suppers, and then go and
21 watch the defendant and see that he did not go away, and to take him to Pine Ridge Agency in the morning.

Lone Bear, John Kills Back, and I, after getting our supper, started to the place where the defendant was stopping. On the way there Lone Bear stopped for a few minutes and John Kills Back and I went on. When we got near the house we saw Pine Bird and Shouts At standing near the house. When we got near the house we stopped, and presently the defendant came out and said, "What you here for bothering me?" John Kills Back says, "Cousin, you are a policeman and know what the rules and orders are." He said, "Yes; I know what the rules and orders are,

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but I told you that I would go with you to Pine Ridge in the morning." Then he shot and hit John Kills Back and fired another shot that hit my coat near the breast and another one that hit my pants leg, and then I ran away. When the defendant shot John Kills Back, the hands of John Kills Back were hanging down straight by his sides and he had no belt on.

Cross-examination:

The defendant was a policeman at the time of the shooting. He had been attending that day to the schools up and down the creek near the farmers; that was a part of his duties as such policeman.

LONE BEAR, being called and duly sworn on the part of the plantiff, testified as follows:

I am a policeman at Pine Ridge Reservation; was on duty at station under the charge of Captain Gleason. He directed me to arrest John Bad Elk on the 13th day of March last, and gave me a letter to give to Major Clapp, agent at Pine Ridge Agency.

I was to go with Crow to arrest Bad Elk, but he was away, and so High Eagle went in his place. We went up there and did not find
22 defendant at his mother's. We then went back and reported to Captain Gleason. He told us to go back and arrest him. We started back. On the way we saw the defendant riding home to his mother's place. When we got there I stayed outside and High Eagle went in. He came out and then I went in. Defendant was smoking. I told him that we had come to take him to Pine Ridge Agency. He said, "All right, I will go with you, but the horse is used up, and I shall have to go to my brother's and get a horse, and we will start in the morning. It is too late to start to-night." Then he went out and saddled his horse and started to Harrison White Thunder's to get a horse. I followed
23 after. When he got to his brother's his horses were out on the range and his brother said as soon as they came in he would bring the horse over.

We then started back, John Bad Elk going ahead, and I followed on after; John Bad Elk went to his mother's place, and we, John Kills Back and High Eagle and I, went down to the station and told Captain Gleason that John Bad Elk said that it was too late to go now, and that he had been to his brother's to get a horse, and that he said that he would go with us in the morning. Captain Gleason then said to us to go and keep watch of him and see that he did not go away and take him to Major Clapp at Pine Ridge in the morning.

We, John Kills Back, High Eagle, and I, started to where John Bad Elk was stopping. It was getting dark by this time. I stopped for a few moments just before we got to the house, and John Kills Back and High Eagle went on ahead pretty soon, and before I got up to where they were some shots were fired, and High Eagle came running by me and I fired and turned and ran.

Cross-examination:

John Bad Elk did not refuse to go with me to Major Clapp's at Pine Ridge Agency any of the time, but said all the time that he would go in the morning; that it was too late to start that night.

He did not get back from attending to his duties with the schools *schools* up and down the creeks until after four o'clock in the afternoon of March 13th last.

John Kills Back and High Eagle and I had our arms with us when we went up to where the defendant was at the time the shooting was done.

PINE BIRD, being called by the plaintiff and being duly sworn, testified as follows:

Just before the shooting was done I stepped out of my house close by where the defendant was stopping and found Shouts At there. We were standing near together and facing High Eagle and John Kills Back as they came up near the house where defendant was stopping and but a step or two away from them. Just then John Bad Elk came out near where we were standing and asked them "What you here for, bothering me all the time?" John Kills Back said, "Cousin, you are a policeman and know what the rules and orders are." John Bad Elk said, "Yes; I know what the rules and orders are. Did I not tell you that I
24 would go with you in the morning?" Just then John Kills Back turned sideways and moved a little forward and then John Bad Elk fired and hit John Kills Back, and he jumped and ran a little ways and fell down and got up and ran a little farther and fell down and groaned and asked for a drink of water. John Bad Elk fired another shot immediately after the first one and then High Eagle ran away.

SHOUTS AT, being called by the plaintiff and duly sworn, testified as follows:

In the evening just before the shooting I was standing outside my house with Pine Bird, when John Kills Back and High Eagle came walking towards the house where John Bad Elk was stopping. They came up within two or three steps of us. We were facing them. Just then John Bad Elk came out of the house near where Pine Bird and I was standing, and asked them, "What you bothering me all the time for." John Kills Back said, "Cousin, you are a policeman and know the rules and orders." Bad Elk said, "Yes; I know the rules and orders. Did I not tell you that I would go with you in the morning?" Just then John Kills Back moved a little and John Bad Elk fired. John Kills Back ran past the end of a wagon box near a fence and fell. Then he got up and went a little farther and fell down again and called for some one to bring him a drink of water. After a little I went out to where he was. He died in a few minutes. Immediately after John Bad Elk fired the shot that hit John Kills Back he fired again, and High Eagle ran away towards Lone Bear. I did not see John Kills Back have a revolver.

In a short time some men (policeman) came up from Mr. Gleason's and took the body down to the schoolhouse near Mr. Gleason's house.

Cross-examination:

The shooting was after dark. There was quite an amount of snow on the ground. Just beyond the corner of the wagon box where John Kills Back fell near the fence there was a bank of snow. A day or two after the shooting, where John Kills Back fell and his hand went into the snow I found his revolver.

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ALFRED OLD SHIELD, being called by the plaintiff and being duly sworn, testified as follows:

I was in the house where defendant John Bad Elk was after he came back from his brother's, and I saw him put a cartridge into the Winchester rifle that he brought with him when he came from Harrison
25 White Thunder's. It was not the house where he stopped and where his mother lived, but close by it.

UNDER THE BAGGAGE, being called on the part of the plaintiff and duly sworn, testified as follows:

After the shooting and the same evening John Bad Elk came into my house. I said to him, "You have done something bad; now you give me that revolver," he said "yes" and handed it to me.

BRINGS PLENTY, being called on behalf of the plaintiff and duly sworn, testified as follows:

During the afternoon preceding the shooting in the evening John Bad Elk was at my house. I live between Harrison White Thunder's and the place where John Bad Elk's mother lives. The big gun [pointing to the Winchester rifle produced in court] is my gun.

STEEL HORSES, being called on the part of the plaintiff and duly sworn, testified as follows:

John Bad Elk came to my house the next morning after the shooting of John Kills Back. This was about seven miles from where the shooting occurred. After he had been there a short time the policemen came in sight. I went to them and then went back to John Bad Elk and told him what they were there for. Then the policemen came up and we all went into the house and sat down and talked a little while, and the defendant gave his gun (the Winchester rifle) to one of the policemen.

DOG CHIEF, being called on the part of the plaintiff and being duly sworn, testified as follows:

I am a policeman at Pine Ridge Agency. I arrested John Bad Elk the morning after the shooting at Steel Horses. He had a gun (Winchester rifle). He delivered up the gun and went with us to Captain Gleason's office at the subagency.

Dr. JAMES R. WALKER, being called on the part of the plaintiff and being duly sworn, testified as follows:

26 I am a regular practicing physician and surgeon. I am located at Pine Ridge Agency as agency physician. I made a post mortem examination of John Kills Back the next day after he was killed. The bullet or cartridge entered his body a little to the left of the center in front and about two inches below the edge of the tenth rib, passed through the body, cutting the aorta from which he bled to death.

And thereupon the plaintiff rested its case.

Defendant's testimony.

Whereupon the attorney for the defendant called JOHN BAD ELK, the defendant, who being duly sworn in his own behalf, testified as follows:

I am the defendant in this action. I knew John Kills Back, who was shot and killed at the Pine Ridge Reservation on the 13th day of March last.

I was a policemen there at that time. During that day I had been looking after the schools along the creek near the station. That was my duty as such policeman. I arrived home at my mother's about half past four in the afternoon. Soon after I arrived at my mother's house High Eagle came into the house, stayed a minute or two, but did not speak; then went outdoor, and Lone Bear came in and said that he was directed to take me to Pine Ridge to Major Clapp. I said, "All right, but my horse is used up, and I shall have to go to my brother's, Harrison White Thunder, and get another horse." Lone Bear said all right. Then I went out, saddled my horse, and started for my brother's, and Lone Bear followed some distance after. When I got to my brother's house his horses were out on the range, and he said that when they came in that he would bring one down to me.

I then started back after Lone Bear, and I got some coffee and he came along some distance behind me. We did not ride side by
27 side or close together. On my way back I stopped at Brings Plenty's and got a Winchester rifle. It was the same as that shown here in court and shown other witnesses. I got it to shoot prairie chickens with I went from there to where I was stopping. I threw the gun on to the house and put out my horse and went in. There were some children playing with some cartridges in the house. I then went out and got the gun and tried one of the cartridges to see if they would fit it, but they would not; then I threw the gun under the bed.

After I had been at my mother's a short time my brother, Harrison White Thunder, came with the horse. He told me that John Kills Back was coming with a bad heart. He left the horse and went down towards the farmer's. I did not see him again that evening. After he had been gone a little while I went outdoor and saw John Kills Back and High Eagle and Pine Bird and Shouts At near the house. I asked John Kills Back and High Eagle what they were there bothering me all the while for. John Kills Back said, "You are a policeman and know what the rules are." I said, "Yes; I know what the rules are, but I told you that I would go to Pine Ridge Agency in the morning." Then he moved a little forward and put his hand around as if to reach for his gun. I saw the gun and shot; then I shot twice more, and John Kills Back and High Eagle ran off. John Kills Back fell after he had gone a short distance. I shot because I knew that they (John Kills Back and High Eagle) would shoot me. I saw their revolvers at the time that I shot.

I stayed about there until morning, when I started to go to the farmer, Mr. Gleason's. After I had gone a short distance I saw a lot of policemen coming, armed. Then I turned and rode off up the creek about seven miles and came to an Indian's by the name of Steel Horses.
28 I talked with him a short time, and then we started towards the farmer's. After going a little ways we saw the policemen coming,

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and then went back. Steel Horses went out to the policemen and stopped and talked, and then came back and said that they had come to arrest, not shoot me. Then we all went into the house, sat down, and talked a while, and I gave up my gun to one of the policemen. I had a cartridge in my gun. I took it out, and then we went to the farmer's.

Cross-examination:

John Kills Back and High Eagle did not go with me to my brother's, Harrison White Thunder. They stopped before they got there, at a house. Lone Bear came to my brother's while I was there. We got some coffee there.

We did not go back together to my mother's. I went ahead and he came after me after I had started. Not very close.

I did not see John Kills Back or High Eagle on my way back. I only saw Brings Plenty and a man driving through a ravine or cut on my way back. I got that gun (Winchester rifle) at Brings Plenty's; I carried it on my saddle. I got it to kill some pra'rie chickens with. My brother came with the horse just at dusk. He put it in the corral, a short distance from the house.

HARRISON WHITE THUNDER, being called on the part of the defendant and being duly sworn, testified as follows:

I know the defendant, John Bad Elk. He came to my house in the afternoon a short time before the shooting of John Kills Back, in the evening. While he was there Lone Bear came. My wife got them some coffee. John Bad Elk wanted to get a horse to ride to Pine Ridge Agency. My horses were out on the range. I told him when they were brought in I would bring it to him. I took it to him at his mother's place. I put it in the corral, near his mother's place. It was just
29 dark when I got there. I told John Bad Elk that John Kills Back was coming to arrest him.

I went from there down to the store at the station. I went from there home. I did not see him again that evening.

Cross-examination:

I did not see John Kills Back after John Bad Elk was at my place after the horse that evening.

And thereupon the defendant rested his case.

The gun used was the ordinary weapon furnished by the U. S. to Indian policemen.

And thereupon the defendant requested the court to give to the jury each of the following instructions, to wit:

1st. If you find from the evidence offered in this action that at the time the defendant, John Bad Elk, fired the shot that killed the deceased, John Kills Back, the defendant had reasonable cause to apprehend from the manner, attitude, and actions of John Kills Back that he had a design to take away his life, or to do him some great bodily injury, and there was reasonable ground to believe the danger imminent that such design would be accomplished, he would have a right to act upon such appearances and kill the deceased, if that was necessary to avoid the apprehended danger, and the killing would be justifiable even though

it might afterwards turn out that the appearances were false and that there was in fact neither design to do him serious injury nor danger that it would be done.

2nd. In determining the question of whether there was reasonable cause to believe that danger to the defendant was imminent at the time that he fired the shot that killed John Kills Back you may properly take into consideration the fact that the defendant and the deceased were
30 Indians, together with the known habits, customs, and education of the Indians on the reservation from which they came and where they lived; and also the fact, if you shall find it from the evidence in this action, that the defendant had been told presently before the killing that the deceased came to the defendant's place of residence at the last time that he did so, with a bad heart.

3rd. Before you can properly convict the defendant of the charge contained in the indictment in this action you must be satisfied from the evidence submitted to you that there was not reasonable grounds for the defendant to believe that there was imminent danger that his life would be taken, or that he was in danger of sustaining great bodily injury at the hands of the deceased at the time that he fired the shot that killed the deceased.

4th. The burden of proof rests upon the prosecution to satisfy you beyond a reasonable doubt, not only that the defendant killed the deceased, but that he killed him without any reasonable or probable cause to believe that his life was in imminent danger, or that he was in imminent danger of suffering great bodily injury.

5th. From the evidence as it appears in this action none of the policemen who sought to arrest the defendant in this action prior to the killing of the deceased, John Kills Back, were justified in arresting the defendant, and he had a right to use such force as a reasonably prudent person might do in resisting such arrest by them.

And thereupon the court denied the requests of the defendant to give said instructions to the jury, or either of them.

To which refusal of the court to give said instructions so requested by the defendant, and to each of them, the defendant then and there duly excepted.

And thereupon the court charged the jury as follows:

31 *Charge of the Court.*

GENTLEMEN OF THE JURY: The defendant, John Bad Elk, is now on trial before you and this court, charged with the crime of murder. It is alleged in the indictment that the defendant, John Bad Elk, an Indian of the Sioux tribe of Indians, late of the Pine Ridge Indian Reservation, in said district, heretofore, to wit, "on the thirteenth day of March, in the year of our Lord one thousand eight hundred and ninety-nine, with force and arms, at the Pine Ridge Indian Reservation, in the district aforesaid and within the exclusive jurisdiction of this court, in and upon one John Kills Back unlawfully, wilfully, feloniously, and of his malice aforethought, did make an assault, and the said John Bad Elk, one certain revolver, commonly called a six-shooter, then and there loaded and charged with gunpowder and leaden bullets, which said

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revolver, he, the said John Bad Elk, then and there held in his hand, then and there wilfully, unlawfully, feloniously, and of his malice aforethought, did discharge and shoot off, at, to, against, and upon the said John Kills Back, and that the said John Bad Elk, with a leaden bullet aforesaid, out of the revolver aforesaid, then and there by force of the gunpowder aforesaid, by the said John Bad Elk, discharged and shot off as aforesaid, the said John Kills Back, in and upon the body of him the said John Kills Back, a little to the left of the center of the body in front and about two inches below the edge of the tenth rib of him the said John Kills Back, then and there unlawfully, wilfully, feloniously, and of his malice aforethought, did strike, penetrate, and wound, giving to him, the said John Kills Back, then and there with a leaden bullet aforesaid, so as aforesaid, shot, discharged, and sent forth out of the revolver aforesaid, by the said John Bad Elk, in and
32 upon the body of him the said John Kills Back, a little to the left of the center of the body in front and about two inches below the edge of the tenth rib of him, the said John Kills Back, one mortal wound, of which said mortal wound he, the said John Kills Back, then and there on the same day, to wit, on the thirteenth day of March in the year of our Lord one thousand eight hundred and ninety-nine, died."

This is an action between the United States and the defendant, John Bad Elk. The jurisdictional questions are not in dispute. It appears from the evidence that the person killed and the person who did the shooting were both full-blood Indians, and residing upon the Pine Ridge Indian Reservation in this State.

The question principally to be determined by you, gentlemen of the jury, is whether or not the killing of John Kills Back by the defendant, John Bad Elk, was murder, or whether it was done in self-defense.

So far as this court is concerned, for the purpose of this case, the court charges you that the deceased, John Kills Back, was lawfully at the place where this killing occurred on the day in question. He was what is known as an "Indian policeman" upon that reservation. He was an officer who had been ordered to arrest the defendant. The defendant, John Bad Elk, also was a policeman upon that reservation, and, so far as the evidence shows, was entitled to be upon the reservation and at the place he was, and to be armed, so far as that is concerned. These two men met at that place where the killing occurred, and the investigation of this case principally requires an investigation of the facts as they existed immediately surrounding the killing.

The deceased, John Kills Back, had been ordered to arrest the defendant; hence he had a right to go and make the attempt to arrest the defendant. The defendant had no right to resist him. It is claimed on the part of the defendant that he made no resistance, and he
33 was willing to go with the officer in the morning. I charge you, of course, that the officer, John Kills Back, had a right to determine for himself when this man should go to the agency with him. Now, what was the character of the crime committed by the defendant, if any, at the time and place in question? That requires the court to define to you the crime which is charged in the indictment. The crime charged in the indictment is what is known as "common-law murder.' Murder at the common law was when a person of sound memory and discretion

it might afterwards turn out that the appearances were false and that there was in fact neither design to do him serious injury nor danger that it would be done.

2nd. In determining the question of whether there was reasonable cause to believe that danger to the defendant was imminent at the time that he fired the shot that killed John Kills Back you may properly take into consideration the fact that the defendant and the deceased were
30 Indians, together with the known habits, customs, and education of the Indians on the reservation from which they came and where they lived; and also the fact, if you shall find it from the evidence in this action, that the defendant had been told presently before the killing that the deceased came to the defendant's place of residence at the last time that he did so, with a bad heart.

3rd. Before you can properly convict the defendant of the charge contained in the indictment in this action you must be satisfied from the evidence submitted to you that there was not reasonable grounds for the defendant to believe that there was imminent danger that his life would be taken, or that he was in danger of sustaining great bodily injury at the hands of the deceased at the time that he fired the shot that killed the deceased.

4th. The burden of proof rests upon the prosecution to satisfy you beyond a reasonable doubt, not only that the defendant killed the deceased, but that he killed him without any reasonable or probable cause to believe that his life was in imminent danger, or that he was in imminent danger of suffering great bodily injury.

5th. From the evidence as it appears in this action none of the policemen who sought to arrest the defendant in this action prior to the killing of the deceased, John Kills Back, were justified in arresting the defendant, and he had a right to use such force as a reasonably prudent person might do in resisting such arrest by them.

And thereupon the court denied the requests of the defendant to give said instructions to the jury, or either of them.

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And thereupon the court charged the jury as follows:

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So far as this court is concerned, for the purpose of this case, the court charges you that the deceased, John Kills Back, was lawfully at the place where this killing occurred on the day in question. He was what is known as an "Indian policeman" upon that reservation. He was an officer who had been ordered to arrest the defendant. The defendant, John Bad Elk, also was a policeman upon that reservation, and, so far as the evidence shows, was entitled to be upon the reservation and at the place he was, and to be armed, so far as that is concerned. These two men met at that place where the killing occurred, and the investigation of this case principally requires an investigation of the facts as they existed immediately surrounding the killing.

The deceased, John Kills Back, had been ordered to arrest the defendant; hence he had a right to go and make the attempt to arrest the defendant. The defendant had no right to resist him. It is claimed on the part of the defendant that he made no resistance, and he
33 was willing to go with the officer in the morning. I charge you, of course, that the officer, John Kills Back, had a right to determine for himself when this man should go to the agency with him. Now, what was the character of the crime committed by the defendant, if any, at the time and place in question? That requires the court to define to you the crime which is charged in the indictment. The crime charged in the indictment is what is known as "common-law murder.' Murder at the common law was when a person of sound memory and discretion

unlawfully killeth any reasonable creature in being, and (in this case) under the peace of the United States, with malice aforethought, either express or implied. You will notice that the particular ingredient in that definition, which distinguishes this crime from all other kinds of homicide, is the malice aforethought which enters into the definition. That malice may be either express or implied. Express malice is said to exist when one person kills another with a sedate, deliberate mind and formed design, such formed design being evidenced by external circumstances discovering the inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. That is express malice. Malice is implied from any deliberate, cruel act committed by one person against another, however sudden, as where a man kills another suddenly without any, or without a considerable, provocation, and with a deadly weapon.

If you believe from all the evidence in this case, beyond a reasonable doubt, that while the deceased was standing there at the place mentioned in the evidence, with his hands at his side, and had done nothing further than to ask the defendant to come with him, and to say to the defendant
that he, defendant, knew the rules and orders of the reservation,
34 and without any other provocation the defendant took out his
revolver and shot him, then your verdict must be "guilty of murder," because the use of a deadly weapon, such as has been introduced in evidence here, consisting of a six-shooter or revolver, is evidence from which malice is implied.

On the other hand, if you should have a reasonable doubt of the truth of the facts just stated, you should acquit; or if you should further believe that at the time these parties met there where the killing actually occurred, the defendant had reasonable grounds to believe, and in good faith believed, that the deceased intended to take his, defendant's life, or to do him great bodily harm, then the defendant had a right to meet such attack with such force as under all the circumstances he at the moment honestly believed, and had reasonable grounds to believe, was necessary to save his life or to protect himself from great bodily injury, even to taking the life of deceased.

In this connection I desire to say to you, gentlemen of the jury, that the deceased, being an officer of the law, had a right to be armed, and for the purpose of arresting the defendant he would have had the right to show his revolver. He would have had the right to use only so much force as was necessary to take his prisoner, and the fact that he was using no more force than was necessary to take his prisoner would not be sufficient justification for the defendant to shoot him and kill him.

The defendant would only be justified in killing the deceased when you should find that the circumstances showed that the deceased had so far forgot his duties as an officer and had went beyond the force necessary to arrest the defendant, and was about to kill him or to inflict
35 great bodily injury upon him, which was not necessary for the
purpose of making the arrest.

You must take the case, gentlemen of the jury, not as it would appear to you or to any of us now sitting here in cool calculation as to what right at the time. The defendant is entitled to have you place yourselves in his place and look at things as they appeared to him, bearing

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in mind the fact always that, in order to make out this defense of self-defense you must be satisfied that the defendant actually believed, and had good reason to believe, that the deceased was about to kill him or to do him great bodily injury.

You have a right, in determining this question of self-defense and with the character of this crime, to take into consideration the character of the Indian, whether or not his life and surroundings renders him more excitable and more apprehensive of danger from another Indian than would exist between two white men.

You will also take into consideration, on considering that question, that the defendant was also a policeman; that in reply to the deceased he said, "I do know the rules and orders," and whether or not, under all the circumstances of the case, he acted honestly and in good faith in the protection of his rights.

I have used the expression "reasonable doubt" in my instructions to you upon the law of this case, and in saying to you what the court considers would be a reasonable doubt I think the following will be as clear for your guidance as anything more elaborate that might be attempted:

"A juror would have a reasonable doubt if, after a careful comparison and consideration of all the evidence in the case, the juror could not say that he had an abiding conviction of the truth of the charge
36 to a moral certainty—a certainty upon which the juror would be willing to act in affairs of great importance to himself. Still, this doubt must be based upon reason and must arise from the consideration of the evidence in the case."

In this case, gentlemen of the jury, as in any other criminal case, the defendant enters upon the trial clothed with the presumption of innocence, and that presumption attends him through all the stages of the case up to the time you find him guilty beyond a reasonable doubt.

If you should find the defendant guilty your verdict would be guilty as charged in the indictment.

I say to you, also, that if you find him guilty you have a right to qualify your verdict by adding thereto the words without capital punishment.

Of course, if you find the defendant ought to be acquitted you will render a verdict of not guilty.

In charging the jury upon the law of the case the court took judicial notice of the rules and regulations prescribed by authority for the government of Indians upon Indian reservations.

37 *Defendant's exceptions to charge of court.*

Mr. VAN BUSKIRK. I desire to except to so much of the charge as advises the jury that the deceased had a right to make this arrest at the time this occurrence happened.

I also object to so much of the charge as advises the jury, under the evidence as it has been given in this case, that the policeman had a right to determine at what time the defendant should go to the agency.

I except to so much of the charge as advises the jury that the deceased had a right to show his revolver unless there was some occasion for it.

And I except to so much of the charge as advises the jury that if they find the defendant guilty they may find him guilty without capital punishment.

unlawfully killeth any reasonable creature in being, and (in this case) under the peace of the United States, with malice aforethought, either express or implied. You will notice that the particular ingredient in that definition, which distinguishes this crime from all other kinds of homicide, is the malice aforethought which enters into the definition. That malice may be either express or implied. Express malice is said to exist when one person kills another with a sedate, deliberate mind and formed design, such formed design being evidenced by external circumstances discovering the inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. That is express malice. Malice is implied from any deliberate, cruel act committed by one person against another, however sudden, as where a man kills another suddenly without any, or without a considerable, provocation, and with a deadly weapon.

If you believe from all the evidence in this case, beyond a reasonable doubt, that while the deceased was standing there at the place mentioned in the evidence, with his hands at his side, and had done nothing further than to ask the defendant to come with him, and to say to the defendant that he, defendant, knew the rules and orders of the reservation,
34 and without any other provocation the defendant took out his revolver and shot him, then your verdict must be "guilty of murder," because the use of a deadly weapon, such as has been introduced in evidence here, consisting of a six-shooter or revolver, is evidence from which malice is implied.

On the other hand, if you should have a reasonable doubt of the truth of the facts just stated, you should acquit; or if you should further believe that at the time these parties met there where the killing actually occurred, the defendant had reasonable grounds to believe, and in good faith believed, that the deceased intended to take his, defendant's life, or to do him great bodily harm, then the defendant had a right to meet such attack with such force as under all the circumstances he at the moment honestly believed, and had reasonable grounds to believe, was necessary to save his life or to protect himself from great bodily injury, even to taking the life of deceased.

In this connection I desire to say to you, gentlemen of the jury, that the deceased, being an officer of the law, had a right to be armed, and for the purpose of arresting the defendant he would have had the right to show his revolver. He would have had the right to use only so much force as was necessary to take his prisoner, and the fact that he was using no more force than was necessary to take his prisoner would not be sufficient justification for the defendant to shoot him and kill him.

The defendant would only be justified in killing the deceased when you should find that the circumstances showed that the deceased had so far forgot his duties as an officer and had went beyond the force necessary to arrest the defendant, and was about to kill him or to inflict
35 great bodily injury upon him, which was not necessary for the purpose of making the arrest.

You must take the case, gentlemen of the jury, not as it would appear to you or to any of us now sitting here in cool calculation as to what right at the time. The defendant is entitled to have you place yourselves in his place and look at things as they appeared to him, bearing

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in mind the fact always that, in order to make out this defense of self-defense you must be satisfied that the defendant actually believed, and had good reason to believe, that the deceased was about to kill him or to do him great bodily injury.

You have a right, in determining this question of self-defense and with the character of this crime, to take into consideration the character of the Indian, whether or not his life and surroundings renders him more excitable and more apprehensive of danger from another Indian than would exist between two white men.

You will also take into consideration, on considering that question, that the defendant was also a policeman; that in reply to the deceased he said, "I do know the rules and orders," and whether or not, under all the circumstances of the case, he acted honestly and in good faith in the protection of his rights.

I have used the expression "reasonable doubt" in my instructions to you upon the law of this case, and in saying to you what the court considers would be a reasonable doubt I think the following will be as clear for your guidance as anything more elaborate that might be attempted:

"A juror would have a reasonable doubt if, after a careful comparison and consideration of all the evidence in the case, the juror could not say that he had an abiding conviction of the truth of the charge
36 to a moral certainty—a certainty upon which the juror would be willing to act in affairs of great importance to himself. Still, this doubt must be based upon reason and must arise from the consideration of the evidence in the case."

In this case, gentlemen of the jury, as in any other criminal case, the defendant enters upon the trial clothed with the presumption of innocence, and that presumption attends him through all the stages of the case up to the time you find him guilty beyond a reasonable doubt.

If you should find the defendant guilty your verdict would be guilty as charged in the indictment.

I say to you, also, that if you find him guilty you have a right to qualify your verdict by adding thereto the words without capital punishment.

Of course, if you find the defendant ought to be acquitted you will render a verdict of not guilty.

In charging the jury upon the law of the case the court took judicial notice of the rules and regulations prescribed by authority for the government of Indians upon Indian reservations.

37 *Defendant's exceptions to charge of court.*

Mr. VAN BUSKIRK. I desire to except to so much of the charge as advises the jury that the deceased had a right to make this arrest at the time this occurrence happened.

I also object to so much of the charge as advises the jury, under the evidence as it has been given in this case, that the policeman had a right to determine at what time the defendant should go to the agency.

I except to so much of the charge as advises the jury that the deceased had a right to show his revolver unless there was some occasion for it.

And I except to so much of the charge as advises the jury that if they find the defendant guilty they may find him guilty without capital punishment.

I desire to except (it perhaps is not necessary) to the court's refusal to give the instructions asked by the defendant and to the refusal of the court to give each of said instructions. And because none of said exceptions so offered and made to the opinion and decision of said court do appear upon the record of said trial, therefore, on the prayer of the defendant, by his counsel, his honor the judge who presided at said trial and made said decisions hath settled and allowed these exceptions.

And the foregoing bill of exceptions contains all of the testimony bearing upon any exception taken, and the same is made a part of the record in this case.

JOHN E. CARLAND, [SEAL.]
U. S. District Judge.

(Endorsed:) United States circuit court. United States vs. John Bad Elk. Bill of exceptions. Filed May 19th, 1899. Oliver S. Pendar, clerk.

38 And afterwards, to wit, on the same day, the following, among other proceedings were entered of record in said court, in said cause, in words and figures the following, to wit:

THE UNITED STATES, PLAINTIFF,
vs.
JOHN BAD ELK, DEFENDANT. } No. 336.

Comes the defendant herein, by his attorney, S. B. Van Buskirk, esq., and represents to the court that he desires to sue out a writ of error in the above-entitled case to the Supreme Court of the United States, and that said defendant is absolutely without means of paying for a transcript of the record to be included in the return of such writ of error, nor for paying for the cost of filing, entering, and the issuing of all papers pertaining to said appeal in the clerk's office of this court.

Whereupon it is ordered that the clerk of this court shall file, enter, and issue all the necessary writs and make the proper returns thereon, at the cost of the United States, to enable the above-named defendant to have the sentence and judgment of this court entered against him reviewed by the Supreme Court of the United States.

39 And afterwards, to wit, on the same day, said defendant files his assignment of errors, which said assignment of errors are in words and figures the following, to wit:

40 United States of America, in circuit court, district of South Dakota, southern division.

UNITED STATES OF AMERICA
vs.
JOHN BAD ELK. } Assignment of errors.

Now comes the defendant, John Bad Elk, in his own proper person and by his attorney and counsel, S. B. Van Buskirk, and in connection with his petition for a writ of error and makes his *his* assignment of errors which he avers occurred upon the trial of said cause, as follows, to wit:

1st. The court erred in allowing B. C. Gleason, a witness called and sworn on the part of the prosecution, to testify on said trial against the

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objection of the defendant that on the 13th day of March, A. D. 1899, that he ordered and directed Lone Bear and another policeman to arrest your pe' for some act or omission of defendant occurring on the 8th day of March, 1899, there being no written authority for such arrest.

2d. The court erred in refusing to charge the jury and give them the following instruction as requested by the defendant:

"If you find from the evidence offered in this action that at the time the defendant, John Bad Elk, fired the shot that killed the deceased, John Kills Back, the defendant had reasonable cause to apprehend from the manner, attitude, and actions of John Kills Back, that he had a design to take away his life or to do him some great bodily injury, and there was reasonable ground to believe the danger imminent that such design would be accomplished, he would have a right to act upon such appearances and kill the deceased, if that was necessary to avoid the apprehended danger; and the killing would be justifiable even though it might afterwards turn out that the appearances were false and that there was in fact neither design to do him serious injury nor danger that it would be done."

3d. The court erred in refusing to charge the jury and give the following instruction requested by the defendant:

"In determining the question of whether there was reasonable cause to believe that danger to the defendant was imminent at the time that he fired the shot that killed John Kills Back, you may properly take into consideration the fact that the defendant and the deceased were Indians, together with the known habits, customs, and education of the
41 Indians on the reservation from which they came and where they lived, and also the fact, if you shall find it from the evidence in this action, that the defendant had been told presently before the killing that the deceased came to the defendant's place of residence at the last time that he did so with a bad heart."

4th. The court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"Before you can properly convict the defendant of the charge contained in the indictment in this action, you must be satisfied from the evidence submitted to you that there was not reasonable ground for the defendant to believe that there was imminent danger that his life would be taken, or that he was in danger of sustaining great bodily injury at the hands of the deceased at the time that he fired the shot that killed the deceased."

5th. The court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"The burden of proof rests upon the prosecution to satisfy you beyond a reasonable doubt, not only that the defendant killed the deceased, but that he killed him without any reasonable or probable cause to believe that his life was in imminent danger or that he was in imminent danger of suffering great bodily injury."

6th. The court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"From the evidence as it appears in this action none of the policemen who sought to arrest the defendant in this action prior to the killing of the deceased, John Kills Back, were justified in arresting the defendant, and he had a right to use such force as a reasonably prudent person might do in resisting such arrest by them."

I desire to except (it perhaps is not necessary) to the court's refusal to give the instructions asked by the defendant and to the refusal of the court to give each of said instructions. And because none of said exceptions so offered and made to the opinion and decision of said court do appear upon the record of said trial, therefore, on the prayer of the defendant, by his counsel, his honor the judge who presided at said trial and made said decisions hath settled and allowed these exceptions.

And the foregoing bill of exceptions contains all of the testimony bearing upon any exception taken, and the same is made a part of the record in this case.

JOHN E. CARLAND, [SEAL.]
U. S. District Judge.

(Endorsed:) United States circuit court. United States vs. John Bad Elk. Bill of exceptions. Filed May 19th, 1899. Oliver S. Pendar, clerk.

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THE UNITED STATES, PLAINTIFF,
vs.
JOHN BAD ELK, DEFENDANT. } No. 336.

Comes the defendant herein, by his attorney, S. B. Van Buskirk, esq., and represents to the court that he desires to sue out a writ of error in the above-entitled case to the Supreme Court of the United States, and that said defendant is absolutely without means of paying for a transcript of the record to be included in the return of such writ of error, nor for paying for the cost of filing, entering, and the issuing of all papers pertaining to said appeal in the clerk's office of this court.

Whereupon it is ordered that the clerk of this court shall file, enter, and issue all the necessary writs and make the proper returns thereon, at the cost of the United States, to enable the above-named defendant to have the sentence and judgment of this court entered against him reviewed by the Supreme Court of the United States.

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UNITED STATES OF AMERICA
vs.
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Now comes the defendant, John Bad Elk, in his own proper person and by his attorney and counsel, S. B. Van Buskirk, and in connection with his petition for a writ of error and makes his *his* assignment of errors which he avers occurred upon the trial of said cause, as follows, to wit:

1st. The court erred in allowing B. C. Gleason, a witness called and sworn on the part of the prosecution, to testify on said trial against the

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objection of the defendant that on the 13th day of March, A. D. 1899, that he ordered and directed Lone Bear and another policeman to arrest your pe' for some act or omission of defendant occurring on the 8th day of March, 1899, there being no written authority for such arrest.

2d. The court erred in refusing to charge the jury and give them the following instruction as requested by the defendant:

"If you find from the evidence offered in this action that at the time the defendant, John Bad Elk, fired the shot that killed the deceased, John Kills Back, the defendant had reasonable cause to apprehend from the manner, attitude, and actions of John Kills Back, that he had a design to take away his life or to do him some great bodily injury, and there was reasonable ground to believe the danger imminent that such design would be accomplished, he would have a right to act upon such appearances and kill the deceased, if that was necessary to avoid the apprehended danger; and the killing would be justifiable even though it might afterwards turn out that the appearances were false and that there was in fact neither design to do him serious injury nor danger that it would be done."

3d. The court erred in refusing to charge the jury and give the following instruction requested by the defendant:

"In determining the question of whether there was reasonable cause to believe that danger to the defendant was imminent at the time that he fired the shot that killed John Kills Back, you may properly take into consideration the fact that the defendant and the deceased were Indians, together with the known habits, customs, and education of the
41 Indians on the reservation from which they came and where they lived, and also the fact, if you shall find it from the evidence in this action, that the defendant had been told presently before the killing that the deceased came to the defendant's place of residence at the last time that he did so with a bad heart."

4th. The court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"Before you can properly convict the defendant of the charge contained in the indictment in this action, you must be satisfied from the evidence submitted to you that there was not reasonable ground for the defendant to believe that there was imminent danger that his life would be taken, or that he was in danger of sustaining great bodily injury at the hands of the deceased at the time that he fired the shot that killed the deceased."

5th. The court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"The burden of proof rests upon the prosecution to satisfy you beyond a reasonable doubt, not only that the defendant killed the deceased, but that he killed him without any reasonable or probable cause to believe that his life was in imminent danger or that he was in imminent danger of suffering great bodily injury."

6th. The court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"From the evidence as it appears in this action none of the policemen who sought to arrest the defendant in this action prior to the killing of the deceased, John Kills Back, were justified in arresting the defendant, and he had a right to use such force as a reasonably prudent person might do in resisting such arrest by them."

And thereupon the court charged the jury, among other things, as follows:

"The deceased, John Kills Back, had been ordered to go and make the attempt to arrest the defendant. The defendant had no right to resist him.

42 "I charge you, of course, that the officer, John Kills Back, had a right to determine for himself when this man should go to the agency.

"The deceased had a right to show his revolver. I say to you, also, that if you find him guilty you have a right to qualify your verdict by adding thereto the words capital punishment."

7th. To each of which said instructions by the court the defendant, before the jury retired, then and there duly excepted, and now here assigns the same for error.

8th. The court erred in adjudging the death penalty against this defendant by its judgment and sentence upon the verdict of the jury in this case.

Wherefore the said John Bad Elk prays that the said judgment and sentence of the said circuit court of the United States for the district of South Dakota be reversed and set aside.

S. B. VAN BUSKIRK,
Attorney for Plaintiff in Error, Sioux Falls, South Dakota.

(Endorsed:) Filed May 19, 1899. Oliver S. Pindar, clerk.

43 And afterwards, to wit, on the same day, said defendant files his petition for a writ of error, whereupon an order was made and entered of record allowing the writ of error as prayed for, which said petition for a writ of error and order allowing same is in words and figures the following, to wit:

UNITED STATES OF AMERICA
vs.
JOHN BAD ELK. } Petition for writ of error.

To the honorable circuit court of the United States for the district of South Dakota:

Your petitioner, John Bad Elk, the defendant above named, respectfully shows to this court, and alleges, that at the April term of

44 said court, A. D. 1899, the grand jury duly empanneled and sworn in the district court for said district, at said April term, returned an indictment into said district court, which was filed in the office of the clerk of said court, charging your petitioner with having wilfully and feloniously, and of his malice aforethought, murdered and killed one John Kills Back, on the 13th day of March, A. D. 1899, at the Rosebud Indian Reservation, in said district; that upon the return and filing said indictment as aforesaid, upon motion of the United States Attorney for said district, the said cause was transferred to the United States circuit court aforesaid for trial; that thereafter your

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petitioner was arraigned upon said indictment, and plead not guilty thereto.

That on the 14th day of April aforesaid said cause came on to be tried before said court and a jury; that upon the conclusion of said trial the jury empanneled therein, after hearing the testimony offered on said trial, the argument of counsel for the respective parties, and the instructions of the court, retired, and, after due deliberation, returned into said circuit court a verdict of guilty, without any recommendations or qualifications. That thereafter, and on the 18th day of April aforesaid, your petitioner presented his motion in arrest of judgment and sentence on said verdict in said action, which motion was overruled by said court; to which ruling of said court denying said motion your petitioner then and there duly excepted, which exception was by the court duly allowed.

That on the 19th day of April aforesaid the judge of said court pronounced the judgment and sentence of said court on said verdict in said action, adjudging and directing that your petitioner, on the 16th
45 day of June, A. D. 1899, be executed by the marshal of said district by hanging by the neck until your petitioner be dead.

That on the trial of said action errors of law were committed and occurred therein, to which your petitioner then and there duly excepted as follows, to wit:

The said court erred in allowing one C. J. Gleason, a witness on the part of and in behalf of the prosecution to testify on said trial, against the objection of your petitioner; that on the 13th day of March, A. D. 1899, he orally, and not by virtue of any writing or process issued by any court or tribunal, ordered and directed two policemen, Lone Bear and another Indian, to arrest your petitioner, for some act or omission alleged to have been committed on the 8th day of March, A. D. 1899.

That said court erred in refusing to give certain instructions to the jury at the request of your petitioner, to which refusal of said court to give said instructions your petitioner then and there duly excepted.

That said court erred in giving certain instructions on its part to said jury, to which error on the part of the said court in giving said instructions your petitioner then and there duly excepted.

And further, that there is no law or statute of the United States under which your petitioner, for said offense charged in said indictment (he being an Indian of the Sioux Tribe of Indians, of the Pine Ridge Indian Reservation, and under the control and guardianship of the United States) can be adjudged or sentenced to suffer the death penalty, and that said judgment and sentence is void for want of jurisdiction to pronounce the same by said court in this case.

That the errors occurring on said trial are more particularly set forth in the assignment of errors in this action, which assignment of errors is herewith filled and made a part of this petition.

46 Wherefore, now, at the April term of said court, A. D. 1899, your petitioner prays this honorable court that a writ of error may be allowed in this case; that the record therein be certified to the Supreme Court of the United States, to the end that said errors may be reviewed by said court, and that the judgment and sentence of the said

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Attorney for Plaintiff in Error, Sioux Falls, South Dakota.

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petitioner was arraigned upon said indictment, and plead not guilty thereto.

That on the 14th day of April aforesaid said cause came on to be tried before said court and a jury; that upon the conclusion of said trial the jury empanneled therein, after hearing the testimony offered on said trial, the argument of counsel for the respective parties, and the instructions of the court, retired, and, after due deliberation, returned into said circuit court a verdict of guilty, without any recommendations or qualifications. That thereafter, and on the 18th day of April aforesaid, your petitioner presented his motion in arrest of judgment and sentence on said verdict in said action, which motion was overruled by said court; to which ruling of said court denying said motion your petitioner then and there duly excepted, which exception was by the court duly allowed.

That on the 19th day of April aforesaid the judge of said court pronounced the judgment and sentence of said court on said verdict in said action, adjudging and directing that your petitioner, on the 16th
45 day of June, A. D. 1899, be executed by the marshal of said district by hanging by the neck until your petitioner be dead.

That on the trial of said action errors of law were committed and occurred therein, to which your petitioner then and there duly excepted as follows, to wit:

The said court erred in allowing one C. J. Gleason, a witness on the part of and in behalf of the prosecution to testify on said trial, against the objection of your petitioner; that on the 13th day of March, A. D. 1899, he orally, and not by virtue of any writing or process issued by any court or tribunal, ordered and directed two policemen, Lone Bear and another Indian, to arrest your petitioner, for some act or omission alleged to have been committed on the 8th day of March, A. D. 1899.

That said court erred in refusing to give certain instructions to the jury at the request of your petitioner, to which refusal of said court to give said instructions your petitioner then and there duly excepted.

That said court erred in giving certain instructions on its part to said jury, to which error on the part of the said court in giving said instructions your petitioner then and there duly excepted.

And further, that there is no law or statute of the United States under which your petitioner, for said offense charged in said indictment (he being an Indian of the Sioux Tribe of Indians, of the Pine Ridge Indian Reservation, and under the control and guardianship of the United States) can be adjudged or sentenced to suffer the death penalty, and that said judgment and sentence is void for want of jurisdiction to pronounce the same by said court in this case.

That the errors occurring on said trial are more particularly set forth in the assignment of errors in this action, which assignment of errors is herewith filled and made a part of this petition.

46 Wherefore, now, at the April term of said court, A. D. 1899, your petitioner prays this honorable court that a writ of error may be allowed in this case; that the record therein be certified to the Supreme Court of the United States, to the end that said errors may be reviewed by said court, and that the judgment and sentence of the said

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circuit court pronounced against your petitioner herein be reversed and set aside and declared void, and your petitioner ever pray.

JOHN BAD ELK,
Defendant.
By S. B. VAN BUSKIRK,
His Counsel.

S. B. VAN BUSKIRK,
of Counsel:

And now, at the April term of said circuit court of the United States, to wit, on the 19th day of May, A. D. 1899, being at the term of said court at which said judgment and sentence was pronounced, it is ordered that said writ of error be, and the same hereby is, allowed as prayed for.

JOHN E. CARLAND,
Judge of Said Court Presiding.

(Endorsed:) Filed May 19, 1899. Oliver S. Pendar, clerk.

47 UNITED STATES OF AMERICA, *Eighth Judicial Circuit, Circuit Court of the United States, District of South Dakota, ss:*

I, Oliver S. Pendar, clerk of said circuit court, do hereby certify and return to the honorable the United States Supreme Court that the foregoing, consisting of 46 pages, numbered consecutively from 1 to 46, inclusive, is a true and complete transcript of the records, indictment, order remitting the same from the district court, arraignment, plea, orders, sentence, bill of exceptions, and all other proceedings in the case of the United States of America vs. John Bad Elk, and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Sioux Falls, in the district of South Dakota, this 28th day of June, A. D. 1899.

[SEAL.] OLIVER S. PENDAR, *Clerk.*

(Return made at cost of U. S. by order of court; hence no int. rev. stamp necessary to above certificate.)

(Indorsed:) United States vs. John Bad Elk. Return to U. S. Supreme Court from circuit court, dist. of South Dakota.

(Indorsement on cover:) File No. 17464. South Dakota C. C., U. S. Term No. 350. John Bad Elk, plaintiff in error, vs. The United States. Filed July 15, 1899. Office Supreme Court of U. S. Received Jul' 15, 1899.

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No. 350.

Motion to advance

Filed Jan. 29, 1900.

Office Supreme Court U. S.
FILED
JAN 29 1900
JAMES H. MCKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

JOHN BAD ELK, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.
No. 350.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

JOHN BAD ELK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 350.

MOTION TO ADVANCE.

The plaintiff in error was indicted on April 5, 1899, in the district court of the United States for the district of South Dakota and the case remitted to the circuit court of the United States for the same district. The indictment charged the defendant, an Indian of the Sioux tribe, with the murder of one John Kill Backs, on the 13th of March, 1899, at the Pine Ridge Indian Reservation. He was tried, and on April 17, 1899, found guilty as charged in the indictment, the jury not qualifying their verdict, and April 19 was sentenced to be hanged.

Both the defendant and the deceased were Indian policemen.

The deceased and another Indian policeman were ordered to arrest the defendant for some offense alleged

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to have been committed by him. The killing grew out of the attempt to make the arrest. It is claimed that as the order to arrest was not given in writing it had no validity, and that the defendant was justified in resisting its enforcement.

In accordance with section 6 of the act of February 6, 1889 (25 Stats., 656), the Solicitor-General respectfully moves the court to advance the case on the docket and set it down for hearing on such day as may be convenient to the court during the present term.

Notice of this motion has been served on counsel for the plaintiff in error.

JOHN K. RICHARDS,
Solicitor-General.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 350.

JOHN BAD ELK, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

At the April term of the United States Circuit Court for the district of South Dakota, A. D. 1899, John Bad Elk, the plaintiff in error, was tried upon an indictment returned into the District Court for the district of South Dakota, by the grand jury duly empanneled at said term of the court, charging him with having murdered one John Kills Back, on the 13th day of March, A. D. 1899, at the Pine Ridge Reservation in said district. The indictment (without setting out the formal part to which no objection is taken), is as follows:

That John Bad Elk, an Indian of the Sioux Tribe of Indians late of the Pine Ridge Reservation in said district, heretofore, to-wit: On the thirteenth day of March in the year of our Lord one thousand eight hundred and ninety-nine with force and arms at the Pine Ridge Indian Reservation in the district aforesaid, and within the exclusive jurisdiction of this court, in and upon one John Kills Back, unlawfully, willfully, feloniously, and of his malice aforethought, did make an assault, and the said John Bad Elk, one certain revolver, commonly called a six shooter, then and there loaded and charged with gunpowder and leaden bullets, which revolver, he, the said John Bad Elk, then and there held in his hand, then and there willfully, unlawfully, feloniously and of his malice aforethought, did discharge and shoot off, at, to, against, and upon the said John Kills Back, and that the said John Bad Elk, with a leaden bullet aforesaid, then and there by force of the gunpowder aforesaid, by the said John Bad Elk discharged and shot off as aforesaid, the said John Kills Back, in and upon the body of him the said John Kills Back, a little to the left of the center of the body in front and about two inches below the edge of tenth rib of him, the said John Kills Back, then and there unlaw-

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fully, willfully, feloniously, and of his malice aforethought, did strike, penetrate, and wound; giving to him the said John Kills Back, then and there, with a leaden bullet aforesaid so as aforesaid shot, discharged, and sent forth out of the revolver aforesaid, by the said John Bad Elk, in and upon the body of him the said John Kills Back a little to the left of the center of the body in front and about two inches below the edge of the tenth rib of him, the said John Kills Back, one mortal wound, of which mortal wound, he, the said John Kills Back then and there on the same day, to-wit: On the thirteenth day of March in the year of our Lord one thousand eight hundred and ninety-nine, died. And so the grand jurors aforesaid, upon their oaths aforesaid, do say, that the said John Bad Elk, him, the said John Kills Back, in the manner and form, and by the means aforesaid then and there willfully, unlawfully, feloniously, and of his malice aforethought, did kill and murder, contrary to form, force, and effect of the statutes of the United States in such cases made and provided and against the peace and dignity of the United States.

To this indictment the defendant entered a plea of not guilty. And thereupon after hearing the testimony, the argument of counsel for the respective parties, the instructions of the court, upon due deliberation the jury returned into the court a verdict of guilty as charged in the indictment, without any qualification as to capital punishment.

That in the 19th day of April, A. D. 1890, the said defendant filed his motion in arrest of judgment, which motion was overruled by the court.

To which ruling and decision said defendant then and there duly excepted, which exception was then and there duly allowed by the court.

That thereupon at the said April term of said court, to-wit: On the 19th day of April, A. D. 1899, said court pronounced its judgment in this case, adjudging that this defendant, plaintiff in error, suffer the punishment of death, and that such penalty be carried out by the marshal of said district on the 16th day of June, A. D. 1899. And thereupon plaintiff in error sued out his writ of error in this case.

STATEMENT OF FACTS MATERIAL TO ERRORS ASSIGNED.

Testimony of B. C. GLEASON:

For about two years prior to the 13th day of March last I have been additional farmer, on the Pine Ridge Reservation, in South Dakota. The defendant was a policeman in my district, and resided with his wife in a cottage near the sub-agency buildings where I had resided and had charge.

I was instructed by the agent in charge of the Pine Ridge Indian Agency, to order the Indian policemen under my charge to arrest any Indian charged with any violation of the rules and regulations prescribed by the Commissioner of Indian Affairs, and cause them to be taken to the agency.

On the 8th day of March last, I heard a couple of shots at or near where the defendant resided. I came down to my house, went in and passed out at the side door of my house, as I stepped out of the door the defendant was passing. I asked him if he shot, he said that he did. I asked him what he shot for, he said that he shot in the air for fun. I said to him come around to the office in a little while and we will talk the matter over. I had always found the defendant to be truthful and gave the matter but little thought at the time, but a complaint was made to me with relation to the defendant. He did not come to my office for several days.

Question: Did you give directions to Lone Bear and Crow, two policemen on the 13th day of March last to arrest the defendant?

To which question defendant by his counsel then and there duly objected, for the reason that the question is immaterial and incompetent, and that the testimony does not show that the witness had any power or authority to direct the arrest of the defendant, nor that he had violated any law of the United States, or any rule or regulation of the Indian Department, neither does it appear that any process has been issued directing the arrest of the defendant.

Which objection was then and there overruled by the court, to which ruling the defendant then and there duly excepted, which exception was duly allowed.

Answer: I ordered Lone Bear and Crow, two policemen to go and arrest the defendant. I gave Lone Bear a letter directed to Major Clapp the agent at Pine Ridge, and told him to take the defendant to the agency at Pine Ridge.

The defendant was at this time stopping at his mother's, a short distance from the sub-agency of which I had charge.

I directed Lone Bear and Crow to report to me on Monday morning, March 13th. Crow failed to report. I directed Lone Bear to have High Eagle assist him in the arrest, and I notified John Kills Back, the deceased, to relieve Bad Elk as school policeman and to assist Lone Bear and High Eagle to arrest the defendant.

It was about twenty-five miles from where the defendant was stopping, to Pine Ridge Agency.

It was getting dark about the time Lone Bear, High Eagle and John Kills Back, the deceased, started for the defendant's mother's place where he was stopping the last time just before the killing

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of the deceased. Soon afterwards I heard some shots fired and heard a man groan. A report soon came that John Kills Back had been shot and killed. I sent some parties to bring in his body. He was dead when they arrived with the body at the school house near my office. He was killed on Pine Ridge Indian Reservation in South Dakota.

Cross-examination:

The direction that I gave for the arrest of the defendant, and for watching him and seeing that he did not get away, was not in writing; was given orally. Printed record page 11

Testimony of LONE BEAR:

I am a policeman at Pine Ridge Reservation, was on duty at station under Captain Gleason. He directed me to arrest John Bad Elk on the 13th of March last, and gave me a letter to Major Clapp, agent at Pine Ridge Agency. I was to go with Crow to arrest Bad Elk, but he was away and so High Eagle went in his place. We went up there but did not find defendant at his mother's. We then went back and reported to Captain Gleason. He told us to go back and arrest him. When we got there I stayed outside and High Eagle went in. He came out and I went in. Defendant was smoking. I told him that we had come to take him to Pine Ridge Agency. He said "all right, I will go with you, but the horse is used up, and I shall have to go to my brother's and get a horse and we will start in the morning. It is too late to start tonight." Then he went out and saddled his horse and started to Harrison White Thunder's to get a horse. I followed after. When he got to his brother's, his horses were out on the range and his brother said as soon as they come in he would bring the horses over. We then started back, John Bad Elk going ahead and I followed after. John Bad Elk went to his mother's and I went to the station and told Captain Gleason that John Bad Elk said that it was too late to go now, that he had been to his brothers to get a horse and that he said that he would go with us in the morning. Captain Gleason then said to us, go and keep watch of him and see that he did not go away and take him to Major Clapp at Pine Ridge in the morning.

John Bad Elk did not refuse to go with me to Major Clapp's at Pine Ridge any of the time, but said all the time that he would go in the morning, that it was too late to start that night.

He did not get back from attending to his duties with the schools until after four o'clock in the afternoon.

John Kills Back, High Eagle and I had our arms with us when we went up to where the shooting was done. It was getting dark when we started to where John Bad Elk was stopping. Just before we got there I stopped for a few minutes and John Kills Back

and High Eagle went on ahead. Pretty soon, and before I got up to where they were I heard some shots fired, and High Eagle came running by me and I fired and turned and ran. Page 12 and 13 printed record.

PINE BIRD'S testimony:

Just before the shooting was done I stepped out of my house close by where the defendant was stopping and found Shouts At there. We were standing close together and facing High Eagle and John Kills Back. Just then John Bad Elk came out near where we were standing and asked them, what, you here, bothering me all the time. John Kills Back said cousin, you are a policeman and know what the rules and orders are. John Bad Elk said yes, I know what the rules and orders are, did I not tell you that I would go with you in the morning. Just then John Kills Back turned sideways and moved a little forwards and then John Bad Elk fired and hit John Kills Back and he jumped and ran a little ways and fell down and got up and ran a little father and fell down and groaned, and asked for a drink of water. Printed record page 13.

SHOUTS AT'S testimony:

In the evening, just before the shooting, I was standing outside my house with Pine Bird, when John Kills Back and High Eagle came walking towards the house where John Bad Elk was stopping. They came up within two or three steps of us. We were facing them, just then John Bad Elk came out of the house near where Pine Bird and I were standing and asked them what you bothering me all the time for. John Kill Back said cousin, you are a policeman and know the rules and orders. Bad Elk said yes, I know the rules and orders, did I not tell you that I would go with you in the morning. Just then John Kills Back moved a little and John Bad Elk fired; John Kills Back ran past the end of a wagon box near a fence and fell, then he got up and went a little father and fell down again and called for some one to bring him a drink of water. After a little while I went out where he was. He died in a few minutes.

The shooting was after dark. There was quite an amount of snow on the ground. Just beyond the corner of the wagon box where John Kills Back fell near the fence there was a bank of snow. A day or two after the shooting where John Kills Back fell and his hand went into the snow I found his revolver. Printed record page 13.

JOHN BAD ELK'S testimony:

I am the defendant. I was a policeman on the 13th day of March last. During the day I had been attending to the schools

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up and down the creek near the station. That was my duty as a policeman. I arrived home at my mother's house about half-past four in the afternoon. Soon after I arrived at my mother's house High Eagle came into the house and stayed a minute or two, but did not speak, then went out door and Lone Bear came in and said that he was directed to take me to Pine Ridge to Major Clapp. I said all right, but my horse is used up, and I shall have to go to my brother's, Harrison White Thunder, and get another horse. Lone Bear said all right. Then I went out, saddled my horse and started for my brother's house and Lone Bear followed some distance after. My brother's horses were out on the range. He said when they came in he would bring one down to me. After Lone Bear and I got some coffee, I started back and he came along some distance behind.

After I had been at my mother's a short time my brother, Harrison White Thunder, came with the horse. He told me that John Kills Back was coming with a bad heart. He left the horse and went towards the farmers.

After he had been gone a little while I went out door and saw John Kills Back and High Eagle, Pine Bird and Shouts At near the house. I asked John Kills Back and High Eagle what they were bothering me all the while for. John Kills Back said you are a policeman and know what the rules are. I said yes, I know what the rules are, but I told you that I would go to Pine Ridge Agency in the morning. Then he moved a little forward and put his hand around as if to reach for his gun. I saw the gun and shot. I shot because I knew that they (John Kills Back and High Eagle) would shoot me. I saw their revolvers at the time that I shot. Printed record page 15 & 16

ASSIGNMENT OF ERRORS.

1st. The Court erred in allowing B. C. Gleason, a witness called and sworn on the part of the prosecution, to testify on said trial, against the objection of the defendant, that on the 13th day of March, A. D. 1899, he ordered and directed Lone Bear and another policeman, to arrest your petitioner for some act or omission of defendant occurring on the 8th day of March, 1899, there being no written authority for such arrest.

2d. The Court erred in refusing to charge the jury and give them the following instruction as requested by the defendant:

"If you find from the evidence offered in this action, that at the time the defendant John Bad Elk, fired the shot that killed the deceased, John Kills Back, the defendant had reasonable cause to apprehend from the manner, attitude and actions of John Kills Back, that he had a design to take away his life, or to do him some great bodily injury and there was reasonable ground to be-

lieve the danger imminent that such design would be accomplished, he would have a right to act upon such appearences and kill the deceased, if that was necessary to avoid the apprehended danger; and the killing would be justifiable, even though it might afterwards turn out that the appearances were false, and there was in fact neither design to do him serious injury, nor danger that it would be done."

3d. The Court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"In determining the question of whether there was reasonable cause to believe that danger to the defendant was imminent, at the time that he fired the shot that killed John Kills Back, you may properly take into consideration the fact that the defendant and the deceased were Indians, together with the habits, customs and education of the Indians on the reservation from which they came and where they lived; and also the fact if you shall so find it from the evidence in this action, that the defendant had been told presently before the killing, that the deceased came to the defendant's place of residence at the last time that he did so with a bad heart."

4th. The Court erred in refusing to charge the jury and to give them the following instruction requested by the defendant:

"Before you can properly convict the defendant of the charge contained in the indictment in this action, you must be satisfied from the evidence submitted to you, that there was not reasonable ground for the defendant to believe that there was imminent danger that his life would be taken, or that he was in danger of sustaining great bodily injury at the hands of the deceased at the time he fired the shot that killed the deceased."

5th. The Court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"The burden of proof rests upon the prosecution to satisfy you beyond a reasonable doubt, not only that the defendant killed the deceased, but that he killed him without any reasonable or probable cause to believe that his life was in imminent danger, or that he was in imminent danger of suffering great bodily injury."

6th. The Court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"From the evidence as it appears in this action, none of the policemen who sought to arrest the defendant in this action, prior to the killing of the deceased, John Kills Back, were justified in arresting the defendant, and he had a right to use such force as a reasonably prudent person might do in resisting such arrest by them."

And thereupon the Court charged the jury among other things as follows:

"The deceased, John Kills Back, had been ordered to go and

BLEED. THROUGH POOR COPY

make the attempt to arrest the defendant. The defendant had no right to resist him.

"I charge you, of course, that the officer, John Kills Back, had a right to determine for himself when this man should go to the agency.

"The deceased had a right to show his revolver. I say to you also that if you find him guilty, you have a right to qualify your verdict by adding thereto the words without capital punishment."

7th. To each of which said instructions by the Court, the defendant before the jury retired then and there duly excepted; and now assigns the same as error.

8th. The Court erred in adjudging the death penalty against this defendant, by its judgment and sentence upon the verdict of the jury in this case.

Wherefore, the said John Bad Elk, prays that the judgment and sentence of the said Circuit Court of the United States for the district of South Dakota, be reversed and set aside.

ARGUMENT.

The first proposition that will be considered, is that growing out of the ruling of the Court in admitting the witness on the part of the prosecution, B. C. Gleason, to testify that he ordered the policemen to go and arrest the defendant; and the charge of the court that they had a right to go and make the attempt to arrest him, which was equivalent to instructing the jury that they had a right to arrest him. These may properly be considered under one head as they involve the question of whether the witness Gleason had a right to order the defendant's arrest, as well as that of the policemen to make the arrest.

It is contended on the behalf of the defendant that the testimony of the witness was immaterial and incompetent and that he had no power or authority to direct the arrest of the defendant, that he had not violated any law of the United States, or any rule or regulation of Indian Department, neither does it appear that any process has been issued directing the arrest of the defendant. The ground upon which it is claimed that the instruction of the Court is erronious is that the evidence did not show that any offense had been committed by the defendant, neither did it show that there was reasonable cause to believe that he had committed any offense, nor that any process had been issued directing his arrest.

The defendant being a resident of the United States, by virtue of the treaty of 1868, the agreement of 1877, and the statute of 1885 hereinafter more particularly cited, having been made amenable to the laws of the United States, was entitled to the protection of those laws in his personal liberty and security as much as any citizen thereof.

The only act so far as the testimony discloses, of which the defendant had been guilty at the time the witness Gleason ordered his arrest on the 13th day of March, was that he had fired a shot in the air on the 8th day of March, for fun, and that he did not come to the office of the farmer Gleason for several days after he had been directed to do so to talk over the matter. That during the interval between the 8th day of March and the 13th he had been stopping at his mother's and attending to the schools near there, as was his duty as such policeman.

There was no pretense that any other act had been committed that could be construed into a violation of the laws of the United States, or of any rule or regulation of the Indian Department. It is not claimed or shown by the evidence that any process had been issued by any court or officer for his arrest, neither can it be claimed that at the time the arrest was ordered, on the 13th day of March, that he was committing any crime, or doing any act in violation of the rules or regulations of the Indian Department.

This leads to the inquiry, when and under what circumstances a person may be arrested for a crime.

The only statute of the United States that I can find that authorizes an arrest to be made by a Federal officer for a criminal offense, are the following sections of the Revised Statutes:

Revised Statutes of the United States, sections 788 and 1014.

Section seven hundred and eighty-eight provides, "that the marshal and their deputies shall have, in each state, the same powers, as sheriffs and their deputies in such state may have, by law, in executing the laws thereof."

Section ten hundred and fourteen provides, that, "for any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and ageeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed as the case may be, for trial before such court of the United States as by law has cognizance of the offense, etc."

We must look to the statutes of South Dakota, then, for the purpose of ascertaining when and under what circumstances, an arrest upon a criminal charge may be made or ordered; unless one of these petty officers on an Indian reservation, are, as they sometimes act as though they were, above and beyond the law; acting sometimes most unfortunately as though they were a law unto themselves, as would seem to have been the fact in this case.

BLEED. THROUGH POOR COPY

The law of South Dakota as to when and under what circumstances an arrest upon a criminal charge can be made, and the persons who may make or order an arrest to be made, is as follows :

Arrest, when and by whom made.

An arrest may be made either by a peace officer under a warrant, by a peace officer without a warrant, or, by a private person.

Compiled laws South Dakota, 1887, section 7139.

An arrest for a felony may be made on any day, and at any time of the day or night. If it is a misdemeaner, the arrest cannot be made at night, unless upon the direction of the magistrate indorsed on the warrant.

Compiled laws South Dakota, section 7141.

The officer must inform the defendant that he acts under the authority of the warrant if required.

Compiled laws South Dakota, section 7144.

If, after notice of intention to arrest, the defendant either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

When a Peace Officer May, Without a Warrant, Arrest a Person.

1st. For a public offense, committed or attempted in his presence.

2d. When the person arrested has committed a felony, although not in his presence.

3d. When a felony has in fact been committed, and he has reasonable cause to believing the person arrested to have committed it.

4th. On a charge, made upon reasonable cause, of the commission of a felony by the party arrested.

Compiled laws South Dakota, 1887, section 7148.

When arresting a person without a warrant, the officer must inform him of his authority and the cause of his arrest, except when he is in the actual commission of a public offense, or is pursued immediately after an escape.

When a Magistrate May Direct the Arrest of a Person.

When a public offense is committed in the presence of a magistrate, he may, by a verbal or written order, command any person to arrest the offender and may thereupon proceed as if the offender had been brought before him on a warrant of arrest.

Compiled laws South Dakota, 1887, section 7153.

When a Private Person May Arrest Another.

A private person may arrest another:

1st. For a public offense committed or attempted in his presence.

2d. When the person arrested has committed a felony, although not in his presence.

3d. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

Compiled laws South Dakota, 1887, section 7154.

This is a substantial reenactment of the Common Law with relation to arrests for crimes. It is there provided that an arrest for crime may be made in four ways: 1st. By warrant; 2d. By an officer without warrant; 3d. By a private person also without a warrant; 4th. By a hue and cry. And then provides that an arrest may be made without warrant as follows:

1st. A justice of the peace may apprehend, himself, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence.

2d. The sheriff, and the coroner may apprehend any felon within the county without warrant.

3d. A constable may without warrant arrest any one for a breach of the peace committed in his presence. And in cases of felony actually committed, or a dangerous wounding, whereby a felony is likely to ensue, may upon probable suspicion arrest the felon, and

4th. A private person that is present when any felony is committed is bound by the law to arrest the felon, and upon probable suspicion, also, a private person may arrest the felon or other person so suspected.

4 Blackstone's Commentaries, (Sharswood's Ed.), pages 298 to 294, inclusive.

An examination of the Revised Statutes of the United States, 1878, and the acts of Congress passed since that time, will disclose, that the only statutes of the United States, that by its terms expressly authorized any officer of the United States to arrest a person upon a criminal charge without process, is section 5522 Revised Statutes, which was repealed by the 25th chapter of the act of February, 1894, page 36, General Laws of the United States.

As has been already said, we must look to the statute of South Dakota and the decision of the courts under similar statutes, to ascertain when, and under what circumstances, a Federal officer may arrest a person without process, upon a criminal charge.

The following cases will illustrate the principle contended for by the defendant in this action :

Wahl vs. Walton, 30 Minn., 506, (S. C. 16 N. W. R., 397.)
Quinn vs. Heisel, 40 Mich., 576.
People vs. McLean, 36 N. W. R., 231.
Sarah Ways Case, 41 Mich., 299, (S. C. 1 N. W. R., 1021.)
People vs. Haley, 84 Mich., 495, (S. C. 12 N. W. R., 671.)
Commonwealth vs. Carey, 12 Cush. (Mass.), 246.

BLEED. THROUGH POOR COPY

Commonwealth vs. McLaughlin, 12 Cush. (Mass.), 615.
People vs. Pratt, 22 Hun., (N. Y.), 300.
Shanley vs. Wells, 71 Ill., 78.
Johnson vs. Garnette, 10 Bush. (Ky.), 221.

These cases hold that an officer cannot arrest a person guilty of a past offense without a warrant, unless such offense amounts to a felony. Under these statutes and decisions the defendant would not have been liable to arrest without process unless he had committed some crime as defined by the statutes of the United States amounting to a felony, or that there was reasonable cause to believe that he had. The evidence in this case shows not only that he had not committed any act that amounted to a felony, but it also shows that there was no reasonable cause to believe that he had, and that the act for which it was sought to arrest him on the 13th day of March, done on the 8th day of March, was not a crime as defined by the statutes of the United States, and further that it was not done in the presence of any peace officer. Inasmuch therefore as no justification can be found under the statutes and decision of the courts justifying either the witness, B. C. Gleason, to order his arrest, or the policemen to make an arrest, we have no other source to look to for a justification of such acts or either of them, except the treaty made between the United States and these Indians, ratified by Congress on the 29th day of April, 1868. See General Laws of the United States, volume 15, page 135, and the agreement entered into between the same parties, February 28th, 1877, volume 19, Statute United States, page 254.

Under this treaty, which repealed all other treaties with these Indians, they did not surrender to the government the right to regulate or control them so far as their personal relations with each other was concerned, neither had congress at that time passed any statute providing for the punishment of these Indians for any crime committed by one member of the tribe against another, as this court held in the Crow Dog case 109, U. S. 556, (S. C. 3 S. C. R., 396). In this case the Court held that the murder of one Indian by another, in the Indian country is not an offense against the laws of the United States, since the clause in section two thousand forty-six of the Revised Statutes excepting crimes committed by one Indian against another from the operation of the general laws of the United States, is not repealed, either expressly or by implication, by the treaty of 1868, or by the agreement of 1877, but remains in full force.

The defendant, therefore, was not liable to arrest so far as the United States was concerned, either with or without process, unless he had violated the provisions of section nine of the Act of March 3d, 1885, providing for the punishment of the crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, or that there was reasonable cause to believe

that he had; or had violated the rules and regulations prescribed by the President for carrying into effect the various provisions of any act relating to Indian affairs and for the settlement of accounts of Indian affairs.

Revised Statutes, section 465.

For a violation of the rules and regulations of the Government of Indian affairs, the defendant would only be liable to be tried by the Indian court of the tribe to which he belonged, and as none of these constituted a felony, the farmer and witness, Gleason, had no authority or right to direct his arrest without such violation was committed in his presence, and even though the act alleged to have been committed was a violation of these regulations and committed in the presence of the witness, five days having intervened between its commission and the time the arrest was ordered, the witness had lost whatever right he would have had to direct the arrest of the defendant for an act committed in his presence.

The offense created by the rules and regulations for the government of the Indians and of which Indian courts have jurisdiction are the following:

1st. The sun dance, the scalp dance, the war dance and all other so-called feasts assimulating thereto shall be considered Indian offenses.

2d. Any plural marriage hereinafter contracted or entered into by any member of the tribe under the supervision of a United States Indian agent, shall be considered an Indian offense cognizable by the court of Indian offenses.

3d. The usual practices of so-called "medicine men" shall be considered "Indian offenses."

4th. Any Indian under the charge of a United States Indian agent who shall willfully destroy, or with intent to steal or destroy, shall take and carry away any property of any value or description, being the property free from all tribal interference, or of any other Indians, shall without reference to the value thereof, be deemed guilty of an "Indian offense."

5th. Any Indian or mixed blood who shall pay or offer to pay any money or other valuable consideration to the friends or relatives of any Indian girl for the purpose of living or cohabiting with said girl or woman, shall be deemed guilty of an "Indian offense."

Rules and regulations of the Indian office, page 106-107.

It might become material here to consider whether an Indian court has a valid existence under the law, and whether a violation of the rules and regulations of the Indian Department constitutes a crime.

The only authority that I have been able to find, under which Indian courts are created, or under which they can be said to exist and exercise jurisdiction, are sections four hundred sixty-five

BLEED. THROUGH POOR COPY

and four hundred and sixty-three of the Revised Statutes, the acts of Congress from and including the year 1890, to the present time making appropriations for the payment of Indian judges, the agreement of February 28th, 1877, *supra* and section five hundred eighty, page 105 of the rules and regulations of the Indian office.

Section four hundred sixty-five of the Revised Statutes provides as follows:

The president may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs and for the settlement of the account of Indian affairs:

Section four hundred sixty-three provides, that the commissioner of Indian affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and matters arising out of Indian relations.

The acts of Congress making appropriations for the payment of Indian judges, which simply appropriates a certain sum of money for that purpose.

The agreement of February 28th, 1877, so far as material to the question under consideration, is as follows:

And they do solemnly pledge themselves that they will at all times maintain peace with the United States, that they will observe the laws thereof, and loyally endeavor to fulfill all the obligations assumed by them under the treaty of 1868, and the present agreement, and to that end will whenever requested by the President of the United States, select so many suitable men from each band to co-operate with him in maintaining order and peace on the reservation as the President may deem necessary.

Section five hundred and eighty of the rules and regulations of the Indian office is as follows:

There shall be established at each Indian Agency except the agency for the five civilized tribes in the Indian Territory, a tribunal, consisting of three Indians (except where the number shall be increased or diminished by special direction of this office), to be known as "the court of Indian offenses," and the members of said court shall each be styled "judge of the court of Indian offenses."

It can hardly be claimed that section 465 of the Revised Statute confers power upon the President to create a court, for the only power conferred on him by virtue of that section is, that he may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of accounts of Indian affairs.

Section four hundred sixty-three, does not confer the power, for that section only confers power on the commissioner of Indian affairs under direction of the Secretary of the Interior to have the management of Indian affairs agreeably to such regulations as the

President may prescribe. He can exercise no greater power or authority than is conferred upon the President, and he can prescribe no rules or regulations except for the purpose of carrying into effect the provisions of an act of Congress relating to Indian affairs.

A difficulty arises however with relation to the power of the President to create a court, in that the constitution provides that the judicial power of the United States, shall be vested in one Supreme court, and such inferior courts as the Congress may from time to time ordain and establish.

Article 3, section 1, constitution.

It is difficult to understand how a Federal court can be created or exercise jurisdiction within the limits of the United States, except by virtue of the constitution, or of an act of Congress creating such Court and conferring jurisdiction thereon; as article three, section one of the constitution provides, "that the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as Congress may from time to time ordain and establish.

It might become material therefor to ascertain how Indian Courts were created and by virtue of what authority they exercise jurisdiction, and the extent of such jurisdiction.

Section five hundred eighty, page one hundred five of the Regulations of the Indian office, adopted in 1884, and published in 1894, seems to be the source from which such courts derive their existence, and exercise their jurisdiction. This section of the regulations create the Court and prescribe the offenses over which they may exercise jurisdiction, and is as follows:

There shall be established at each Indian agency except the agency for the five civilized tribes in the Indian Territory, a tribunal, consisting of three Indians (except where the number shall be increased or diminished by special direction of this office), to be known as the "Court of Indian Offenses", and the members of said court shall be styled "Judges of the Court of Indian Offenses". Agents may select from the members of the tribe, persons of intelligence and good moral character and integrity, and recommend the same to this office for appointment as judges. Each judge shall be appointed by this office for the term of one year.

Then follows regulations for the terms of such court, and the offenses over which they may exercise jurisdiction, which are the same as heretofore quoted and contained in rules 4, 5, 6, 7 and 8, of the rules and regulations, page 105, *supra*.

This section 580 of the regulations of the Indian office, and the acts of Congress commencing with the year 1890 *supra*, and continuing to the present time, making appropriations for the payment of Indian judges, constitutes the only foundation upon which it can be claimed that Indian courts have a legal existence.

Conceding that these various acts of Congress appropriating

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money for the payment of Indian judges would in effect be creating such courts by act of Congress, the most that could be claimed would be, that such courts could exercise jurisdiction over such offenses and such only as are prescribed in rules 4, 5, 6, 7 and 8 of the regulations of the Indian office. And unless the defendant had violated these rules or some one of them, or had committed one of the crimes mentioned in the act of March 3d, 1885 *supra*, neither the Indian police or any one else had a right to arrest him either with or without process.

Another difficulty that suggests itself with relation to these Indian courts is that it is provided by the agreement of 1877 *supra*, made between these Indians and the United States, that they will loyally endeavor to fullfill all the obligations assumed by the treaty of 1868 and the present agreement (being the agreement of 1877) and to that end will, whenever requested by the President of the United States, select so many suitable men from each band to co-operate with him in maintaining order and peace on the reservation as the president may deem necessary.

A fair construction of this agreement would require that whenever the Congress of the United States provided for the punishment of offenses committed on this reservation and a tribunal for the trial thereof, that these Indians will peaceably submit thereto; but that as to other matters not constituting an offense under the statutes of the United States, they were to have a voice in the selection of the men who should be authorized to maintain order and peace on the reservation; but so far as these rules and regulations are concerned they have no voice in their selection whatever, they are entirely ignored.

It would seem, therefore, that this court would be slow to hold that these Indian courts came within the purview of this agreement, or that congress, in this indirect way (by these appropriation bills providing for the payment of Indian judges) intended to ignore this agreement solemnly entered into by the United States with these Indians, and thereby created courts, and made a violation of the rules and regulations of the Indian office a criminal offense, subjecting the person violating the same to imprisonment.

This court has held in the case of the United States against Eaton, 144 U. S., 677; 12 S., C. R., 764-767, that regulations prescribed by the President and by the heads of the departments, under authority granted by congress, may be regulations prescribed by law, so as to lawfully support acts done under them and may thus have the force of law; but it does not follow that a thing so required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense. Therefore in this case there being no statute making it a criminal offense to violate the rules and regulations of the Indian

department, the defendant was not liable to arrest for a violation of such rules and regulations.

Had the defendant violated either of these rules four, five, six, seven or eight, or the act of March 3d, 1885? The testimony shows that all he had done was to fire two shots in the air for fun, but this act was not an offense either under these rules, or the statute.

It may be urged that the policemen who sought to arrest the defendant being officers, will be presumed to be there in the proper discharge of the duties of their office, but this would be like the presumption at one time indulged in "that the king can do no wrong," but this presumption can hardly be indulged in this country, and must give way to that other presumption thrown around the defendant by the constitution and laws as his shield and protection, that a man is presumed innocent until he is proven guilty. And the evidence in this case shows that the defendant had not committed any crime or offense. Therefore, neither the farmer, Gleason, had any authority to direct his arrest, or the policeman to make it, unless such authority can be found in the statutes of South Dakota; as the statutes of the United States provides that, as to proceedings with relation to the arrest of offenders, they must conform to the usual mode of process in the state where the defendant may have committed an offense; and as we have seen no authority under the facts as they appear in this case would justify his arrest.

If correct in the conclusion that no Indian court has been legally established in this reservation, that the defendant has not violated any statute of the United States, or any of the rules or regulations of the Indian office or that Congress has not made a violation of those rules a criminal offense, then the instruction of the Court that the policemen had a right to attempt to make the arrest of the defendant was erronious, and for that reason the judgment of the Court should be reversed.

The Court erred in refusing to give to the jury the following instruction, at the request of the defendant:

If you find from the evidence offered in this action, that at the time the defendant John Bad Elk, fired the shot that killed the deceased, John Kills Back, the defendant had reasonable cause to apprehend from the manner, attitude and actions of John Kills Back, that he had a design to take away his life, or do him some great bodily injury, and there was reasonable ground to believe the danger imminent that such design would be accomplished, he would have a right to act upon such appearances and kill the deceased, if that was necessary to avoid the apprehended danger, and the killing would be justifiable, even though it might afterwards turn out that the appearances were false, and that there was in fact neither design to do him serious injury, nor danger that it would be done.

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That this instruction is correct, and should have been given to the jury, is fully established by the following cases:

People vs. Shorter, 2 Comstock (N. Y.), 193.
Campbell vs. People, 16 Ill., 17.
Schnier vs. People, 23 Ill., 17.
Maher vs. People, 24 Ill., 241.
Roach vs. People, 77 Ill., 25.
Steinmeyer vs. People, 95 Ill., 383.
Lange vs Commonwealth, 38 Penn. St., 265.
Murray vs. Commonwealth, 79 Penn. St., 311.
Pond vs People, 8 Mich., 150.
Holloway vs. Commonwealth, 11 Bush. (Ky.), 344.
Stanley vs. Commonwealth, 6 S. W. R. (Ky.), 155.
People vs. Anderson, 44 Cal., 65.
State vs. Sloan, 47 Mo., 604.
Patillo vs. State, 22 Texas App. 586-3 S. W. R., 766.
Spearman vs. State, 4 S W. R. (Texas App.), 586.
United States vs. King, 34 Fed. 302.

The Court upon refusing to give the foregoing instruction upon request of the defendant, gave in lieu thereof the following instruction:

If you believe from all the evidence in this case beyond a reasonable doubt, that while the deceased was standing there at the place mentioned in the evidence, with his hands at his side and did nothing further than to ask the defendant to come with him and say to the defendant that he, defendant, knew the rules and orders of the Reservation, and without any other provocation the defendant took out his revolver and shot him, then your verdict must be "guilty of murder," because the use of a deadly weapon, such as has been introduced in evidence here, consisting of a six-shooter or revolver, is evidence from which malice is implied.

On the other hand, if you should have reasonable doubt of the truth of the facts just stated, you should acquit, or, if you should further believe that at the time these parties met there where the killing actually occurred, the defendant had reasonable grounds to believe and in good faith believed that the deceased intended to take his, defendant's life, or to do him great bodily harm, then the defendant had a right to meet such attack with such force as under all the circumstances he at the moment honestly believed, and had reasonable grounds to believe, was necessary to save his life or to protect himself from great bodily injury, even to taking the life of deceased.

In this connection I desire to say to you gentlemen of the jury, that the deceased being an officer of the law, had a right to be armed, and for the purpose of arresting the defendant, he would have the right to show his revolver. He would have had the right to use only so much force as was necessary to take his prisoner, *and the fact that he was using no more force than was necessary to take*

his prisoner would not be sufficient justification for the defendant to shoot and kill him.

The defendant contends that inasmuch as the testimony in this case shows that at the close of the conversation between the deceased and the defendant immediately preceding the shooting, the deceased advanced toward the defendant a step, put his hand around as to draw his revolver and did draw it, that it was found where his hand went into the snow where he fell (see testimony of defendant page 15 of printed record of Pine Bird, page 23, and of Shouts At, page 43 of printed record), entitled him to have this case submitted to the jury, upon the question of self-defense clearly, fully and fairly.

That the instruction of the Court upon this subject did not do so is apparent from the fact, that the Court in saying to the jury that the defendant must have believed "in good faith" that the deceased intended to take defendant's life, that defendant must have "honestly believed" that it was necessary to take decedent's life to save his own or to protect himself from great bodily injury, followed by the statement of the Court, that "the fact was that the deceased was using no more force than was necessary to take his prisoner," was not a full and fair statement of the law of self-defense.

By this instruction the Court stated, not by way of an opinion, but as a positive statement of fact, that the deceased used no more force than was necessary to take his prisoner, and therefore as a whole, carried to the jury the implied conclusion at least of the Court that in the opinion of the Court the defendant did not act honestly or in good faith; and besides this instruction withdrew from the consideration of the jury the right to act upon the apprehended danger to his life, or serious injury to his person growing out of the conduct, attitude and actions of the deceased at the time the defendant fired the shot that killed the deceased, but carried with it to the jury a statement that under the law the danger to the defendant must have been actual and real, before the defendant could justify the killing under the plea of justifiable homicide.

Patillo vs. State, 22 Texas App., 586- 3 S. W. R., 766.
Spearman vs. State, 23 Texas App., 224- 4 S. W. R., 586.

and cases cited last above, in connection therewith.

It appearing from the testimony in this case that the defendant had neither violated any law of the United States, nor any of the rules or regulations of the Indian Department, the Court erred in refusing to give the following instruction asked by the defendant.

From the evidence as it appears in this action, none of the policemen who sought to arrest the defendant in this action prior to the killing of the deceased, John Kills Back, were justified in arresting the defendant, and he had a right to use such force as a reasonably prudent person might do in resisting such arrest by them.

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Commonwealth vs. Carey, 12 Cush. (Mass.), 246.
Commonwealth vs McLaughlin, 12 Cush. (Mass.), 615.
Roberts vs. State, 14 Mo., 138.
Jones vs. State, 14 Mo., 409.
State vs. Medlin, 1 Wins. (N. C.), L. No. 2, 97.
Commonwealth vs. Drew, 4 Mass , 391.

Instructions that assume the existence of material facts in dispute in a criminal case is calculated to mislead a jury, and is erroneous.

The Court erred in instructing the jury "that the use of a deadly weapon, such as has been introduced in evidence here, consisting of a six-shooter or revolver, is evidence from which malice is implied."

The Judgment of the Court Imposing the Penalty of Death Was in Excess of its Power.

In considering this proposition, three questions naturally present themselves for consideration:

1st. Is there any provision in the Revised Statutes of the United States, under which the defendant could be tried and convicted for the crime with which he is charged in the indictment in this action?

2d. Is there any statute passed since such revision, under which he could be tried and convicted, and

3d. If there has been such a statute passed, has it been repealed or so modified that he cannot now be sentenced to punishment of death?

The first question was determined by this Court in the Crow Dog case, 109 U. S., 556. In this case this Court held that the murder of one Indian by another in the Indian country was not an offense against the laws of the United States, since the clause in section 2146 of the Revised Statutes, excepting crimes by one Indian against another from the general laws of the United States, is not repealed, either expressly or by implication, by the treaty of 1868 or the agreement of 1877, but remain in full force.

This opinion was rendered in December, 1883, and there was no legislation on the part of Congress affecting their relations or making them amenable to the laws of the United States, for any act, injury or wrong committed by one Indian against another, on their reservation until the act of March 3d, 1885, 23 statute at large, page 385, which, so far as it affects the question at issue in this case, is as follows:

That immediately upon and after the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor

to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes respectively; and the said courts are hereby given jurisdiction in all such cases.

And all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

This act being unrepealed or modified no question could be made as to the liability of an Indian to be tried for any of the offenses named in the foregoing act before the courts therein mentioned.

United States vs. Kagima, 118 U. S., 375- 6 S. C. R., 1109.
Expart parte Gon Shay-ee, 130 U. S., 542, S. C. R., 343.

By this act the government assumed an entirely new attitude with relation to these Indians.

By this act the Government held these untutored Indians, just emerging from a savage state, to the same degree of accountability, and required them to adopt the same code of morals, and subjected them to the same penalties in relation to their conduct and acts towards each other, as has been enacted for the government of the most enlightened and educated people in the affairs of life. While it is not the province of this Court, by its decision to alter or diminish the punishment provided by this act, yet it may take into consideration the condition and habits of these people in arriving at a conclusion as to the purpose and intent of Congress, in passing the act of January, 1897, being chapter 29 of the General Laws of 1897, so far at least as such intent may be deduced from the terms of such Act, which is as follows:

Section 1. That in all cases where the accused is found guilty of the crime of murder or rape under sections 5339 or 5345, Revised Statutes, the jury may qualify their verdict, by adding thereto "without capital punishment;" and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment at hard labor for life.

Section 2. That except offenses mentioned in section 5332, 1342, 1624, 5339 and 5345, Revised Statutes, when a person is convicted of any offense to which the punishment of death is now specifically affixed by the laws of the United States, he shall be sentenced to imprisonment at hard labor for life, and when any person is convicted of any offense to which the punishment of death or a lesser punishment, in the discretion of the court, is

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affixed, the maximum punishment shall be imprisonment at hard labor for life.

Section 3. That the punishment of death prescribed for any offense specified by the *statutes* of the United States, except in sections 5332, 1342, 1624, 5339 and 5345, Revised Statutes, is hereby abolished, and all laws and parts of laws inconsistent with this act is hereby repealed.

Section 4. That nothing herein contained shall apply to or in any way affect any proceeding or indictment now found or pending or that may be found for any offense committed before the passage of this act, and all offenses committed before the passage of this act shall be punished under the laws then in force: Provided, that juries may return qualified verdicts in such cases according to the provisions of section one of this act, and the sentences shall be imposed as therein provided.

Section 5. That any Indian who shall commit the offense of rape within the limits of any Indian reservation shall be punished by imprisonment at the discretion of the Court. So much of the ninth section of chapter 341 of the Acts of the year 1885 as is inconsistent herewith is herewith repealed.

This act seems to be a revision of the Revised Statutes, as well as all other Statutes of the United States, in which the punishment of death has been prescribed as a penalty for the commission of any crime against the laws of the United States.

We should therefore look to the Revised and other Statutes of the United States and ascertain in what cases the penalty of death was imposed, passed prior to the Act of January, 1897. And since the Act of 1897 is an Act to reduce the cases in which the penalty of death may be inflicted, and being a remedial Act should be construed liberally so as that such penalty shall not be inflicted in any case not clearly within its provisions, even though it did not contain any repealing clause.

United States vs. Claflin, 97 U. S., 546.
United States vs. Tynen, 11 Wall., 88-91.
Murdock vs. City of Memphis, 20 Wallace, 590-611.
Kent vs. United States (Circuit Court Appeals), 73 Fed., 680.
Rogers vs. Nashville C. & St. L. Ry. Co. (C. C. A.), 91 Fed, 323.
Norris vs. Crocker et al., 18 How, 429.

In construing an act of legislation whether a statute enacted by the legislature or a constitution established by the people as the supreme law of the land, regard must be had to all parts of the Act, and to the condition and history of the law as previously existing.

United States vs. Wang Kim. Ark., 169 U. S., 649- 18 S. C. R., 456-458.
State vs. Forkner, 70 Ind., 241.

Words in a statute will never be construed as meaningless and

surplusage if a construction can legitimately be found which will give force to and preserve all the words of a statute, and every sentence and clause should be given effect, and taken into account in order to determine the intent of the legislature.

Leversee vs. Reynolds, 13 Iowa, 310.
Opinion of the Justices, 22 Pick. (Mass.), 571.
Hagenbeck vs. Rogers, 3 Neb., 17.
James vs. Dubois, 16 N. J. L. (Harr.), 285.
Hitchins vs Niblo, 4 Black. (Ind.), 148.

Courts when endeavoring to ascertain the intention of the legislature will be justified, in some circumstances in considering the injustice that may arise from a particular construction of a statute.

Bate Refrigerating Co. vs. Suzberger, 157 U. S., 1-15 S. C. R., 508-516.
Wilson vs. Rosseau, 4 How , 646-680.
United States vs. Fisher, 2 Cranch, 358-385.

In construing remedial statutes, it is an established rule, that cases not within the letter, but within the reason of a statute, will be embraced within its provisions.

State vs. Canton, 43 Mo., 48.
Middleton vs. Greson & Cases cited, 106 Ind., 18-5 N. E. R., 755.
City of Evansville vs. Summers, 108 Ind., 189-9 N. E. R., 81-83.

Applying these rules to the construction of the Act of January 15th, 1897, *supra*, the defendant contends that the penalty of death cannot be imposed upon him in this case for the following reasons:

That in passing the Act of 1897, Congress had in mind those persons and those only, who could be convicted under sections 5332, 1342, 1624, 5339 and 5345, as those sections were construed by this Court in the Crow Dog case, 109 U. S., 556. That such was the intent of Congress, seems manifest, for that in section 2 of the Act of 1897, Congress has excepted from the operation of that Act the persons and offenses included within and covered by the above sections of the Revised Statutes, and repealed the death penalty in all cases in which the punishment of death is specifically affixed by the laws of the United States, and also in cases where a person is convicted of an offense to which the punishment of death, or a lesser punishment in the discretion of the Court is affixed, and to the latter the maximum punishment is imprisonment for life. By section 3 of the Act of 1897, Congress abolished the death penalty for all offenses specified by the statutes of the United States, except in sections 5332, 1342, 1624, 5339 and 5345 Revised Statutes.

It would seem as though Congress in passing the Act of 1897, intended to and had divided the persons and offenses then punishable with the death penalty into two classes, to-wit: those

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punishable under sections 5339, 1342, 1624 and 5345 Revised Statutes, as construed by this Court in the Crow Dog case composing one class, and those coming within other sections of the Revised Statutes, and other statutes of the United States, in another class.

It will be observed that under the provisions of section 1 of the Act of 1897, that it is only when the accused is convicted under sections 5339 and 5345 Revised Statutes, that the penalty of death can be imposed, and in which the jury may qualify their verdict by adding thereto "without capital punishment," and that when the verdict is so qualified the accused shall be sentenced to imprisonment at hard labor for life. The defendant could not be tried or convicted under either of those sections; he could only be tried and convicted under and by virtue of section 9 of the Act of March 3d, 1885.

Sections 5339 and 5345 are carried in connection with sections 5332, 1342 and 1624 into sections 2 and 3 of the Act of 1897, and the death penalty retained as to the offenses covered by those sections of the Revised Statutes, and repealed or abolished as to all offenses covered by other provisions of the Revised or other statutes of the United States.

Section 2 of the Act of 1897, after excluding the persons and offenses contemplated by sections 5332, 1342, 1624, 5339 and 5345 Revised Statutes of the United States, abolishes the death penalty as to every other offense covered by the provisions thereof, in which the punishment of death may be imposed. Thus showing that by sections 1 and 2 of the Act of 1897, that Congress was legislating with reference to and had in contemplation those offenses and those only, covered by the various sections of the Revised Statutes, in which the punishment of death was affixed. Then as if to put the purpose and intent of Congress beyond any possible peradventure they added section 3 of the Act of 1897, which provided as follows:

That the punishment of death prescribed for any offense specified by the *Statutes* of the United States, except in sections 5332, 1342, 1624, 5339 and 5345 *Revised Statutes*, is hereby abolished, and all laws and parts of laws inconsistent with this Act is hereby repealed.

Sections 1342 and 1624, included with sections 5332, 5339 and 5345 of the Revised Statutes, in sections 2 and 3 of the Act of 1897, which provides for the punishment of offenses committed by those in the military service of the United States (and for which the persons committing them, can only be tried by a military court or tribunal), taken in connection with the other sections contained therein, are significant as showing that Congress in associating them, each with the other, in the same clause of sections 2 and 3 of the Act of 1897, had in mind in legislating in relation thereto, those persons and those only, who might be tried

and convicted under the sections of the Revised Statutes enumerated therein, within the rule established by this Court in the Crow Dog case.

Section 5332 Revised Statutes is the one that provides for the punishment of treason; deemed in the law the gravest offense of which a person can be found guilty. The punishment for this offense as prescribed by this section, is death, or imprisonment at hard labor for not less than five years, etc., in the discretion of the court; and is the only offense mentioned in the Revised Statutes, in which the penalty provided, is death, or imprisonment in the discretion of the Court; but under section 2 of the Act of 1897, the death penalty is abolished for this offense, and the maximum penalty fixed at imprisonment at hard labor for life.

In section 5372, Revised Statutes, the penalty for murder is death, but under section 2 of the Act of 1897, the penalty of death is abolished as to the offense therein defined, and the maximum punishment therefor fixed at imprisonment for life, and the same is true as to many of the other offenses in which the penalty of death in the Revised Statutes is prescribed.

Section 9 of the Act of March 3d, 1885, provides that when an Indian commits any of the offenses therein defined, he shall be punished in accordance with the laws of the Territory, whether committed within or without an Indian reservation. If, therefore, it should so happen that the laws of the Territories or any one of them did not prescribe the penalty of death for murder, then we should have this anomalous condition in the law, that an Indian committing the crime of murder at one place in the United States could only be sentenced to imprisonment, while if he committed the same act in another place therein he might be sentenced to the death penalty; and yet in each case he is tried under the same Act and by courts created by a law of the United States. The Act of March 3d, 1885, having provided that the punishment of death should be imposed upon an Indian committing the crime of murder against another Indian in the Territories of the United States, where that penalty was affixed by the laws of such Territory, was repealed by section 3 of the Act of January 15, 1897, for it is expressly provided by that section, "that the punishment for any offense specified by the *Statutes* of the United States, except in sections 5332, 1342, 1624, 5339 and 5345, *Revised Statutes*, is abolished, Congress having retained the death penalty as to the offenses enumerated in those sections, and abolished it as to all other sections of the Revised Statutes where affixed, there was no statute save the statute of March 3, 1885, to which the repealing clause of section 3 of the Act of January, 1897, could apply. And as has already been shown in construing an Act of the legislature, each section, clause and word should be given effect if possible.

In conclusion defendant contends that Congress by the Act of January 15th, 1897, intended to diminish, lessen the penalty pro-

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vided by the Act of March 3d, 1885, for the act with which he is charged when committed by one Indian against another, as well as in the case of white men committing crimes against the laws of the United States in which the penalty of death was affixed, for that:

1st. He could not be convicted under section 1 of the Act of January 15th, 1897, of either the crime of murder or rape, but only under section 9 of the Act of March 3d, 1885.

2nd. Being an Indian, one of a particular class, and only amenable under the law for specific acts, with a specific penalty attached, within contemplation of the act of March 3d, 1885, he came within that clause of section 3 of the Act of 1897, which provides that "when a person is convicted of an offense to which the punishment of death is now specifically affixed by the laws of the United States, he shall be sentenced to imprisonment at hard labor for life, or no penalty could be imposed."

3d. That by section 2 of the Act of January 15th, 1897, the penalty of death prescribed by section 5332, being the section of the Revised Statutes defining treason, the gravest crime known to law, is abolished.

4th. That the penalty of death, specifically defined and specifically punished under and by virtue of the provisions of sections 5365, 5368, 5369, 5370, 5371, 5372, 5373, 5374, 5375, 5376, 5385 and 5387, is abolished under and by virtue of the Act of January 15th, 1897, section 3.

5th. That under section 3 of the Act of January 15th, 1897, while a white man may be sentenced to the punishment of death, an Indian is only liable to imprisonment at the discretion of the Court.

It would have been entirely unnecessary for Congress to have added section 5 to the Act of 1897, and placed the punishment for rape by an Indian at imprisonment in the discretion of the Court, but for the purpose of relieving him from the penalty of imprisonment at hard labor for life, imposed by section 2 of the Act of 1897, and also to carry out the purpose of Congress to reduce the cases in which the penalty of death should be imposed.

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No. 350.

Brf. of Atty. Gen.

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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

JOHN BAD ELK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 350.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

BRIEF FOR UNITED STATES.

JAS. E. BOYD,
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FACTS.

Bad Elk, the plaintiff in error, is an Indian, and belongs to the Sioux tribe, in what is called the Pine Ridge Reservation, in the State of South Dakota. On the 13th day of March, 1899, he shot and killed another Indian belonging to the said tribe within the limits of the reservation, named John Kills Back. For this Bad Elk was indicted in the district court of the United States for the district of South Dakota on the 5th of April, 1899 (see

indictment, Record, pp. 2, 3, and 4); was tried upon the said indictment at the said term, convicted by the jury of the crime of murder, and sentenced by the court to be hanged on the 16th day of June, 1899.

For errors assigned upon exceptions taken during the trial and upon the law as held by the court, the case is here upon writ of error for review. The evidence for the prosecution will be found in the record, beginning on page 9 and ending on page 14, and consists of the testimony of B. J. Gleason, High Eagle, Lone Bear, Pine Bird, Shouts At, Alfred Old Shield, Under the Baggage, Brings Plenty, Steel Horses, Dog Chief, and Dr. James R. Walker, and is substantially as follows:

Bad Elk was a policeman in the reservation. On the 8th of March, 1899, Gleason, who was what is called "additional farmer," and who lived near Bad Elk, heard two shots at or near the latter's residence. Shortly after the shooting Gleason saw Bad Elk, and asked him who shot. Bad Elk said that he had shot—that he had only shot into the air for fun. Gleason then told Bad Elk to come around to the office in a little while and they would talk the matter over; but the latter did not come to the office for several days.

On the 13th of March, following the date of the shooting, Gleason gave directions to Lone Bear and Crow, two Indian policemen, to arrest Bad Elk and take him to Pine Ridge Agency to Major Clapp (Clapp being the Indian agent at that place). Crow did not report for duty in making the arrest, and on the afternoon of the 13th of March Gleason sent Lone Bear and High Eagle to make the arrest. These two went to Bad Elk's

mother's, where he was stopping, and came back and reported to Gleason that Bad Elk was not there. Gleason then told them that Bad Elk was not at his mother's, but had gone to his brother's, and he further instructed Lone Bear and High Eagle to watch and see that Bad Elk did not go away, and to take him to the agency at Pine Ridge in the morning. Gleason also directed Lone Bear to have High Eagle assist him in the arrest, and he (Gleason) notified John Kills Back, the deceased, to relieve Bad Elk as a school policeman and assist Lone Bear and High Eagle in making the arrest.

Lone Bear, High Eagle, and John Kills Back started out about dark on the 13th of March to find Bad Elk and to arrest him. Soon after the three started, under the directions of Gleason, the latter heard some shots fired, and the report soon came that John Kills Back had been shot and killed. (See testimony of B. J. Gleason, beginning page 9 of Record.

When Lone Bear and High Eagle were ordered to go and arrest Bad Elk they went first to the latter's mother's house, and, not finding him there, returned and reported the fact to Gleason, who sent them back to find and get the defendant. As the two were returning they saw Bad Elk coming toward his mother's place, and when they arrived there Lone Bear remained outside and High Eagle went into the house. Bad Elk had just returned from looking after the schools, which was part of his duty as a policeman, and was in the house smoking. High Eagle went in and told him that they had come to take him to the agency at Pine Ridge. Bad Elk, however, declined to go that evening, but said

that he would go in the morning. His reason for not going that evening was that his horse was used up and that he would have to go to his brother's and get a horse—that it was too late to start that night. Bad Elk then came out of the house, saddled his horse, and went over to Harrison White Thunder's (another Indian, who is said to be a brother of Bad Elk).

In the meantime John Kills Back had joined the party, and the three—High Eagle, Lone Bear, and Kills Back—followed along some distance behind Bad Elk as he went toward his brother's, but Kills Back and High Eagle stopped at a house before reaching the brother's and Lone Bear followed on to that place. After stopping at his brother's for awhile, Bad Elk rode back to his mother's, and the three—Lone Bear, High Eagle, and Kills Back—rode along a distance behind him, not very close.

On the way back to his mother's Bad Elk stopped on the road and got a Winchester rifle and took it home with him.

The three who had been sent to make the arrest reported to Gleason that Bad Elk had been to his brother's to get a horse, and that he said he would go with them to the Pine Ridge Agency in the morning, and Gleason gave instructions then that they go and watch Bad Elk and see that he did not go away, and to take him to Pine Ridge in the morning. After getting supper, the three started again to the place where Bad Elk was stopping. On the way Lone Bear stopped and High Eagle and Kills Back went on. When they reached the place, they saw Pine Bird and Shouts At, two Indians, standing near the house, and when High Eagle and Kills

Back came near the house they stopped, and Bad Elk came out and said, "What are you here bothering me for?" Kills Back says, "Cousin, you are a policeman and know what the rules and orders are." Bad Elk replied, "Yes, I know what the rules and orders are, but I told you I would go with you to Pine Ridge in the morning." He then shot and hit Kills Back and fired another shot that hit High Eagle's coat near the breast and another one that hit the latter's pants' leg. (The weapon used by Bad Elk at the time, as charged in the indictment, was a six-shooter; see testimony of Under the Baggage, record, p. 14).

Kills Back fell and High Eagle ran away, and as he went by Lone Bear, who was coming up, the latter fired and turned and ran. The shooting was all after dark. There was quite an amount of snow on the ground and Kills Back fell near the fence where there was a bank of snow. A day or two after the shooting, Shouts At, an Indian who was a witness for the prosecution, found a revolver in the snow where Kills Back's hand went in as he fell. (See cross-examination Shouts At, record, p. 13.)

These facts are taken from the testimony of Gleason before cited, and of High Eagle, Lone Bear, Pine Bird, and Shouts At, on pages 11, 12, and 13 of the record.

The defense introduced only two witnesses, Bad Elk himself and his brother, Harrison White Thunder. There is no material disagreement until the scene of the killing is reached, and as to this, Bad Elk, after stating the conversation that was had when High Eagle and Kills Back came back, and Pine Bird and Shouts At

were near the house, says that when he, Bad Elk, said, "I know what the rules are, but told you I would go to the Pine Ridge Agency in the morning," Kills Back leaned forward and put his hand around as if to reach for a gun; that he, Bad Elk, saw the gun and shot. He then shot twice more, and Kills Back and High Eagle ran off, Kills Back falling after he had gone a short distance. "I shot," says Bad Elk, "because I knew that they, Kills Back and High Eagle, would shoot me; I saw their revolvers at the time I shot." Bad Elk also states that he borrowed a Winchester rifle that afternoon from Brings Plenty, and that he got it to shoot prairie chickens; that when he got to where he was stopping he threw the gun on the house and went in; that he afterwards threw the gun under the bed. Harrison White Thunder testifies that Bad Elk came to his house and wanted to get a horse to go to Pine Ridge Agency; that his horses were out on the range, and that he told him he would bring him one in the morning. (See testimony of Bad Elk and White Thunder, pp. 15 and 16 of the record.)

It appears from the testimony of Steel Horses that the Winchester rifle had been given to one of the policemen before the killing occurred.

ARGUMENT.

The only point raised by the counsel for the plaintiff in error which I am inclined to discuss is that the court exceeded its power in imposing the death sentence in this case. The broad ground is taken that, under the law as

it stands, an Indian can not be punished with death, but is liable only to imprisonment in case of conviction of a crime for which a white man can be executed. I can not agree to this proposition.

A leading case upon this question is *Ex parte* Crow Dog (109 U. S., 556), but that decision was anterior to the time that the former Territory of Dakota came into the Union as two States, North and South Dakota, and before the legislation relative to the jurisdiction of the courts of the United States over crimes committed in Indian reservations which I refer to hereafter. It was held in that case that there was no law or treaty at that time which had the effect to repeal or abrogate the provisions of section 2146 of the Revised Statutes, which excepts from the general jurisdiction of the courts of the United States offenses committed in the Indian country by one Indian against the person or property of another Indian. But since that case was decided, the act of March 3, 1885 (23 Stat., 385), has been passed. I call the attention of the court particularly to the latter clause of the said act, which read as follows:

> And all such Indians committing any of the above crimes [murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny] against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

Crow Dog's case was decided at October term, 1883, and from the fact that the legislation above referred to followed so closely, I think it reasonable to conclude that the object of the act of March 3, 1885, was to change the situation which that decision disclosed and to place the Indians living upon reservations within the States or Territories of the United States within the jurisdiction of the Federal courts for trial, and to attach punishment in case of conviction the same as would attach to other persons under the laws of the United States.

The constitutionality and effect of the statute of March 3, 1885, was passed upon by this court in the case of the *United States* v. *Kagama and another*, reported in 118 U. S., 375. In that case the said act is held to be constitutional and to confer jurisdiction upon the courts of the United States of the offense of murder committed by one Indian upon the body of another within an Indian reservation situated within the limits of a State, as in the case now under consideration. Kagama murdered another Indian by the name of Iyouse within the limits of the Hoopa Valley Reservation in the State of California, and the case was passed upon by the Supreme Court upon six questions certified from the circuit court for the district in which Kagama was tried. The point of all the questions was well set out in the third and sixth. In the third it was asked whether the provision of section 9 of the said act is a constitutional and valid law of the United States. The sixth asked whether the courts of the United States have jurisdiction to punish an Indian belonging to an

Indian tribe for committing murder upon another Indian belonging to the same tribe within an Indian reservation. The substance of the decision in the case is to answer these two questions in the affirmative.

There is still another case—*In re Gon-shay-ee* (130 U. S., 343)—in which it is held by the Supreme Court that the act of March 3, 1885, was enacted to transfer to Territorial courts the jurisdiction to try the crimes described in it, including that of murder under Territorial laws when sitting as and exercising the functions of a Territorial court, and not when sitting as or exercising the functions of a circuit court of the United States under section 1910. The case of Gon-shay-ee is cited only to call the attention of the court to the language of the opinion on page 350, in which it says, referring to the portion of the act of March 3, 1885, now under consideration: "This is the last section of the Indian appropriation bill for that year, and it is very clearly a continuation of the policy upon which Congress entered several years previously, of attempting, so far as possible and consistent with justice and existing obligations, to reduce the Indians to individual subjection to the laws of the country and dispense with their tribal relations."

These decisions seem to be so conclusive of the matter that I do not deem it necessary to pursue it further.

The other assignments of error, based upon the exceptions taken to the admission of testimony and portions of the charge of the court, I am content to leave to be considered upon the record and the argument presented by the counsel for the plaintiff in error. I take this

course because, upon an examination of the testimony, and considering the circumstances under which this homicide was committed, I am not satisfied that this Indian ought to be executed.

I have investigated the matter carefully and I am free to admit that I have not been able to find any law or regulation which made the mere discharging of a gun within an Indian reservation a criminal offense, nor from what source the person called "additional farmer" derives authority to order an arrest upon a reservation for an alleged offense. The right to prescribe regulations and establish rules for the carrying into effect of the various provisions of law relative to Indian affairs is conferred upon the President by section 465 of the Revised Statutes, and it is held in *Wilcox* v. *Jackson* (13 Pet., 498), which decision is followed in 7 Op. Atty. Gen., 453, that the President speaks and acts through the heads of the several Departments in relation to subjects which pertain to their respective duties. The rules for the Indian police service will be found in "Regulations of the Indian Office, with an appendix containing the forms used," published by authority of the Secretary of the Interior, 1894, on pages 55, 56, 57, and 58. On page 57 is Rule XVI, as follows:

> Before making an arrest, it needs only to be ascertained that the offense charged constitutes a crime or misdemeanor for which a person can be lawfully detained, and that the ground for the charge is reasonable.

There does not appear in the rules and regulations any method of procedure by which it is to be ascertained

whether a crime or misdemeanor has been committed, or if there is reasonable ground to charge any person with having been guilty of an offense; nor is there any direction as to whether orders for arrest shall be in the nature of a written warrant or given orally.

I can very well understand how this Indian, when he saw High Eagle, Lone Bear, and Kills Back following him about through the neighborhood, should become somewhat apprehensive. The movements of these men, who had orders to arrest him, were probably, from Bad Elk's standpoint, mysterious. They would keep at a distance from him as he was passing about from one place to another, and would then disappear and report to the additional farmer, and again they would return. And finally, after dark, they came to the place where he was, and the unfortunate killing took place as described. I think that, although it was unintentional on his part, the additional farmer who ordered this pursuit of Bad Elk was largely responsible for the homicide. While I do not feel at liberty to criticise him severely, I must say that I can not see what necessity there was, upon the trivial charge which appears against Bad Elk, for the detail of three armed men to shadow him about through the neighborhood, as was done in this instance.

I have therefore concluded that this is not a case in which the life of the plaintiff in error ought to be taken as a punishment. I have not found enough in the record to warrant me in filing a confession of error as to any of the assignments upon exceptions taken to the testimony or charge of the court; but, as I before stated, I have determined to submit these matters for the consideration

of the court upon the record and brief of the counsel for the plaintiff in error.

In view of what I have said, I think it is fitting for me to state that if the court shall, as I submit it must, affirm the judgment, the Department of Justice will feel constrained to present the case to the President as a proper one for the exercise of clemency by a commutation of the sentence.

JAS. E. BOYD,
Assistant Attorney-General.

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JOHN BAD ELK *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

No. 350. Submitted February 26, 1900. — Decided April 30, 1900.

Three policemen in South Dakota attempted, under verbal orders, to arrest another policeman for an alleged violation of law, when no charge had been formally made against him, and no warrant had issued for his arrest. Those attempting to make the arrest carried arms, and when he refused to go, they tried to oblige him to do so by force. He fired and killed one of them. He was arrested, tried for murder and convicted. The court charged the jury: "The deceased, John Kills Back, had been ordered to arrest the defendant; hence he had a right to go and make the attempt to arrest the defendant. The defendant had no right to resist him. It is claimed on the part of the defendant that he made no resistance, and he was willing to go with the officer in the morning. I

charge you, of course, that the officer, John Kills Back, had a right to determine for himself when this man should go to the agency with him. . . . In this connection I desire to say to you, gentlemen of the jury, that the deceased, being an officer of the law, had a right to be armed, and for the purpose of arresting the defendant he would have had the right to show his revolver. He would have had the right to use only so much force as was necessary to take his prisoner, and the fact that he was using no more force than was necessary to take his prisoner would not be sufficient justification for the defendant to shoot him and kill him. The defendant would only be justified in killing the deceased when you should find that the circumstances showed that the deceased had so far forgot his duties as an officer and had gone beyond the force necessary to arrest the defendant, and was about to kill him or to inflict great bodily injury upon him, which was not necessary for the purpose of making the arrest." *Held*, that the court clearly erred in charging that the policemen had the right to arrest the plaintiff in error and to use such force as was necessary to accomplish the arrest, and that the plaintiff in error had no right to resist it.

At common law, if a party resisted arrest by an officer without warrant, and who had no right to arrest him, and if, in the course of that resistance the officer was killed, the offence of the party resisting arrest would be reduced from what would have been murder, if the officer had had the right to arrest, to manslaughter.

THE case is stated in the opinion.

Mr. Thomas B. McMartin and *Mr. S. B. Van Buskirk* for plaintiff in error.

Mr. Assistant Attorney General Boyd for defendants in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The plaintiff in error was convicted in April, 1899, in the Circuit Court of the United States, in South Dakota, of the murder on March 13, 1899, of John Kills Back at the Pine Ridge Indian Reservation in South Dakota, and sentenced to be hanged. The case is brought here on writ of error to the Circuit Court.

Both the deceased and the plaintiff in error were Indians and policemen, residing on the reservation at the time of the killing.

Upon the trial it appeared that the plaintiff in error, on March 8, 1899, while out of doors, fired a couple of shots from

his gun at or near the place where he resided. Soon after the firing, one Captain Gleason, (who stated that he was what is called an "additional farmer" on the same reservation,) having heard the shots, and meeting the plaintiff in error, asked him if he had done that shooting, and he said that he had; that "he had shot into the air for fun;" to which Gleason responded by saying to him, "Come around to the office in a little while, and we will talk the matter over." Thereupon they separated. As he did not come to the office, Gleason, after waiting several days, gave verbal orders to three of the Indian policemen to go and arrest plaintiff in error at his mother's house near by, and take him to the agency, some twenty-five miles distant. No reason for making the arrest was given, nor any charge made against him. The policemen (one of whom was the deceased) went to the house where the plaintiff in error was stopping, and came back and reported to Gleason that he was not there, and they were then ordered to return and wait for him and to arrest him. They returned to the house, but came back again and reported that the plaintiff in error said that he would go with them to the agency in the morning; that it was too late to go with them that night. Gleason then told them to watch him and see that he did not go away, and in the morning to take him to the Pine Ridge Agency.

The policemen then again went back to the house where plaintiff in error was staying and met him coming towards his mother's place. He went into the house, and one of their number followed him; found him smoking, and told him that they had come to take him to the agency at Pine Ridge. Plaintiff in error refused to go, and the policeman went outside. Another of them then went into the house, and in a few minutes both he and the plaintiff in error came out, and the latter saddled his horse and went over to the house of a friend, and they followed him. It was getting dark when he came back to his mother's house, still followed by them, and while following the plaintiff in error to his house on this last occasion they were joined by others, so that when he went into the house there were four or five men standing about it. In a short

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time the plaintiff in error came out, and asked of those outside, "What are you here bothering me for?" The deceased said: "Cousin, you are a policeman, and know what the rules and orders are." To which plaintiff in error replied: "Yes; I know what the rules and orders are, but I told you I would go with you to Pine Ridge in the morning." Then, according to the evidence for the prosecution, the plaintiff in error, without further provocation, shot the deceased, who died within a few minutes.

The policemen had their arms with them when they went up to where the plaintiff in error was at the time the shooting was done.

This is substantially the case made by the prosecution.

There is an entire absence of any evidence of a complaint having been made before any magistrate or officer charging an offence against the plaintiff in error, and there is no proof that he had been guilty of any criminal offence, or that he had even violated any rule or regulation for the government of the Indians on the reservation, or that any warrant had been issued for his arrest. On the contrary, Gleason swears that his orders to arrest plaintiff in error were not in writing, but given orally. Indeed, it does not appear that Gleason had any authority even to entertain a complaint or to issue a warrant in any event.

The plaintiff in error testified in his own behalf, and said that during the day he had been looking after the schools along the creek near the station; that that was his duty as a policeman; that he arrived at his mother's house about half past four in the afternoon, and soon afterwards an Indian named High Eagle came into the house, staid a minute or two, but did not speak, then went out doors, and Lone Bear came in, and said that he was directed to take the plaintiff in error to Pine Ridge to Major Clapp. To which the plaintiff replied: "All right, but my horse is used up, and I shall have to go to my brother's, Harrison White Thunder's, and get another horse." Lone Bear said all right. Then the plaintiff in error started for his brother's, and when he got there found that the horses were out on the range, and when they came in his brother promised to bring one of them down to him. (In this he was corroborated by his

brother, who testified that he brought the horse over about dark.) On his way back to his mother's the plaintiff in error stopped at a friend's and got a Winchester rifle for the purpose, as he said, of shooting prairie chickens. When he went back to his mother's he was there but a short time when the deceased and two or three others came to his house to arrest him, and the plaintiff in error went out, and according to his testimony the following was what occurred: "I asked John Kills Back and High Eagle what they were there bothering me all the while for. John Kills Back said: 'You are a policeman, and know what the rules are.' I said: 'Yes; I know what the rules are, but I told you that I would go to Pine Ridge Agency in the morning.' Then the deceased moved a little forward, and put his hand around as if to reach for his gun. I saw the gun and shot; then I shot twice more, and John Kills Back and High Eagle ran off. John Kills Back fell after he had gone a short distance. I shot because I knew that they (John Kills Back and High Eagle) would shoot me. I saw their revolvers at the time I shot." This was in substance all the evidence.

Counsel for plaintiff in error asked the court to charge as follows:

"From the evidence as it appears in this action, none of the policemen who sought to arrest the defendant in this action prior to the killing of the deceased, John Kills Back, were justified in arresting the defendant, and he had a right to use such force as a reasonably prudent person might do in resisting such arrest by them."

The court denied the request, and counsel excepted.

The court charged the jury, among other things, as follows:

"The deceased, John Kills Back, had been ordered to arrest the defendant; hence he had a right to go and make the attempt to arrest the defendant. The defendant had no right to resist him. It is claimed on the part of the defendant that he made no resistance, and he was willing to go with the officer in the morning. I charge you, of course, that the officer, John Kills Back, had a right to determine for himself when this man should go to the agency with him.

* * * * * * * *

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"In this connection I desire to say to you, gentlemen of the jury, that the deceased, being an officer of the law, had a right to be armed, and for the purpose of arresting the defendant he would have had the right to show his revolver. He would have had the right to use only so much force as was necessary to take his prisoner, and the fact that he was using no more force than was necessary to take his prisoner would not be sufficient justification for the defendant to shoot him and kill him. The defendant would only be justified in killing the deceased when you should find that the circumstances showed that the deceased had so far forgotten his duties as an officer and had gone beyond the force necessary to arrest defendant, and was about to kill him or to inflict great bodily injury upon him, which was not necessary for the purpose of making the arrest."

This charge was duly excepted to.

We think the court clearly erred in charging that the policeman had the right to arrest the plaintiff in error, and to use such force as was necessary to accomplish the arrest, and that the plaintiff in error had no right to resist it.

The evidence as to the facts immediately preceding the killing was contradictory; the prosecution showing a killing when no active effort was at that very moment made to arrest, and the defendant showing an intended arrest and a determination to take him at that time at all events, and a move made by the deceased towards him with his pistol in sight and a seeming intention to use it against the defendant for the purpose of overcoming all resistance. Under these circumstances the error of the charge was material and prejudicial.

At common law, if a party resisted arrest by an officer without warrant, and who had no right to arrest him, and if in the course of that resistance the officer was killed, the offence of the party resisting arrest would be reduced from what would have been murder, if the officer had had the right to arrest, to manslaughter. What would be murder, if the officer had the right to arrest, might be reduced to manslaughter by the very fact that he had no such right. So an officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence. 1 Arch. Crim. Pr.

& Pl. 7th Am. ed. 103, note (1); also page 861 and following pages; 2 Hawk. P. C. 129, sec. 8; 3 Russell on Crimes, 6th ed. 83, 84, 97; 1 Chitty's Crim. L. star page 15; 1 East P. C. c. 5, page 328; *Derecourt* v. *Corbishley*, 5 E. & B. 188; *Fox* v. *Gaunt*, 3 B. & Ad. 798; *Reg.* v. *Chapman*, 12 Cox's Crim. Cas. 4; *Rafferty* v. *The People*, 69 Ill. 111; *S. C.* on a subsequent writ, 72 Ill. 37. If the officer have no right to arrest, the other party might resist the illegal attempt to arrest him, using no more force than was absolutely necessary to repel the assault constituting the attempt to arrest. 1 East, *supra.*

We do not find any statute of the United States or of the State of South Dakota giving any right to these men to arrest an individual without a warrant on a charge of misdemeanor not committed in their presence. Marshals and their deputies have in each State, by virtue of section 788, Revised Statutes of the United States, the same powers in executing the laws of the United States as sheriffs and their deputies in such State may have by law in executing the laws thereof. This certainly does not give any power to an officer at the Pine Ridge Agency to arrest a person without warrant, even though charged with the commission of a misdemeanor. These policemen were not marshals nor deputies of marshals, and the statutes have no application to them.

By section 1014 of the Revised Statutes, the officers of the United States named therein, and certain state officers, may, agreeably to the usual mode of process against offenders in such State, order the arrest of an offender for any crime or offence committed against the United States. This section has no application.

Referring to the laws of South Dakota, we find no authority for making such an arrest without warrant. The law upon the subject of arrests in that State is contained in the Compiled Laws of South Dakota, 1887, section 7139 and the following sections, and it will be seen that the common law is therein substantially enacted. The sections referred to are set out in the margin.[1]

[1] SEC. 7139. An arrest may be either—

1. By a peace officer, under a warrant;

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No rule or regulation for the government of Indians upon a reservation has been cited, nor have we found any, which prohibits the firing of a gun there, "for fun," nor do we find any law, rule or regulation which authorizes an arrest, without war-

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2. By a peace officer, without a warrant; or,

3. By a private person.

SEC. 7141. If the offence charged is a felony, the arrest may be made on any day and at any time of the day or night. If it is a misdemeanor, the arrest cannot be made at night, unless upon the direction of the magistrate indorsed upon the warrant.

SEC. 7144. The officer must inform the defendant that he acts under the authority of the warrant, and must also show the warrant if required.

SEC. 7145. If, after notice of intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

SEC. 7148. A peace officer may, without a warrant, arrest a person—

1. For a public offence committed or attempted in his presence.

2. When the person arrested has committed a felony, although not in his presence.

3. When a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it.

4. On a charge made upon reasonable cause of the commission of a felony by the party arrested.

SEC. 7150. He may also at night, without a warrant, arrest any person whom he has reasonable cause for believing to have committed a felony, and is justified in making the arrest, though it afterward appear that the felony had not been committed.

SEC. 7151. When arresting a person without a warrant, the officer must inform him of his authority and the cause of the arrest, except when he is in the actual commission of a public offence, or is pursued immediately after an escape.

SEC. 7153. When a public offence is committed in the presence of a magistrate, he may, by a verbal or written order, command any person to arrest the offender, and may thereupon proceed as if the offender had been brought before him on a warrant of arrest.

SEC. 7154. A private person may arrest another—

1. For a public offence committed or attempted in his presence.

2. When the person arrested has committed a felony, although not in his presence.

3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

SEC. 7155. He must, before making the arrest, inform the person to be arrested of the cause thereof, and require him to submit, except when he is in the actual commission of the offence, or when he is arrested on pursuit immediately after its commission.

rant, of an Indian not charged even with the commission of a misdemeanor, nor does it anywhere appear that Gleason had authority to issue a warrant for an alleged violation of the rules or regulations.

It is plain from this review of the subject that the charge of the court below, that the policemen had the right to arrest this plaintiff in error, without warrant, and that, in order to accomplish such arrest, they had the right to show and use their pistols so far as was necessary for that purpose, and that the plaintiff in error had no right to resist such arrest, was erroneous. That it was a material error, it seems to us, is equally plain. It placed the transaction in a false light before the jury, and denied to the plaintiff in error those rights which he clearly had. The occasion of the trouble originated in Gleason's orders to arrest him, and in the announced intention on the part of the policemen, which they endeavored to accomplish, to arrest the plaintiff in error that night and take him to the agency, and all that followed that announcement ought to be viewed in the light of such proclaimed intention. And yet the charge presented the plaintiff in error to the jury as one having no right to make any resistance to an arrest by these officers, although he had been guilty of no offence, and it gave the jury to understand that the officers, in making the attempt, had the right to use all necessary force to overcome any and all opposition that might be made to the arrest, even to the extent of killing the individual whom they desired to take into their custody. Instead of saying that plaintiff in error had the right to use such force as was absolutely necessary to resist an attempted illegal arrest, the jury were informed that the policemen had the right to use all necessary force to arrest him, and that he had no right to resist. He, of course, had no right to unnecessarily injure, much less to kill, his assailant; but where the officer is killed in the course of the disorder which naturally accompanies an attempted arrest that is resisted, the law looks with very different eyes upon the transaction, when the officer had the right to make the arrest, from what it does if the officer had no such right. What might be murder in the first

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case might be nothing more than manslaughter in the other, or the facts might show that no offence had been committed.

The plaintiff in error was undoubtedly prejudiced by this error in the charge, and the judgment of the court below must therefore be

Reversed, and the case remanded with instructions to grant a new trial.